(10) No. 98-231-CFX

Title: Grupo Mexicano De Desarrollo, S. A., et al., Petitioners
v.
Alliance Bond Fund, Inc., et al.

Docketed: August 5, 1998

Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Aug 4 1998	Petition for writ of certiorari filed. (Response due September 30, 1998)
	Aug 11 1998	Order extending time to file response to petition until September 30, 1998.
	Sep 30 1998	Brief of respondents Alliance Bond Fund, Inc., et al. in opposition filed.
	Oct 14 1998	DISTRIBUTED. October 30, 1998
	Nov 2 1998	REDISTRIBUTED. November 6, 1998
	Nov 9 1998	REDISTRIBUTED. November 13, 1998
	Nov 20 1998	REDISTRIBUTED. November 25, 1998
	Nov 30 1998	Petition GRANTED. SET FOR ARGUMENT March 31, 1999.
		**********
	Jan 14 1999	Brief of petitioner Grupo Mexicano De Desarrollo, S.A., et al. filed.
	Jan 14 1999	Joint appendix filed.
	Jan 14 1999	LODGING consisting of twenty-three bound copies of Joint Lodging Materials submitted by counsel for the petitioners received.
	Jan 14 1999	Brief amicus curiae of Dominican Republic filed.
	Jan 19 1999	Second Circuit Confidential Joint Appendix received. (IN SAFE)
	Feb 11 1999	CIRCULATED.
	Feb 16 1999	Brief of respondents Alliance Bond fund, Inc., et al. filed.
	Feb 16 1999	Brief amici curiae of Securities Industry Association, et al. filed.
	Feb 16 1999	Brief amicus curiae of United States filed.
	Feb 25 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 25 1999	Record filed.
	Mar 8 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
	Mar 18 1999	Reply brief of petitioner Grupo Mexicano De Desarrollo, S.A., et al. filed.
	Mar 31 1999	ARGUED.

1 pp

Supreme Court, U.S.
FILED

(1)

No. 98 231 AUG 4 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Petitioners,

- against -

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P. and THE VARDE FUND IV-A, L.P.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Dated: August 4, 1998

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83 pp

QUESTION PRESENTED FOR REVIEW

Is a United States District Court empowered to issue a preliminary injunction prohibiting a defendant from transferring or assigning assets unrelated to the plaintiff's underlying claim and held outside of the court's jurisdiction in order to ensure that funds will be available to satisfy a potential money judgment?

LIST OF PARTIES

The defendants to the proceeding below were petitioners Grupo Mexicano de Desarrollo, S.A.; Desarrollo de Infraestructura, S.A. de C.V.; Obras Y Proyectos, S.A. de C.V.; Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. The plaintiffs to the proceedings below were respondents Alliance Bond Fund, Inc.; Alliance World Dollar Government Fund II, Inc.; Alliance Global Dollar Government Fund, Inc.; Elliot Associates, L.P.; Avalon Total Return Fund, L.P.; The Varde Fund, L.P.; The Varde Fund II-A, L.P.; The Varde Fund II-B, L.P.; The Varde Fund III-A, L.P.; The Varde Fund III-B, L.P. and The Varde Fund IV-A, L.P.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Petitioners Grupo Mexicano de Desarrollo, S.A.; Desarrollo de Infraestructura, S.A. de C.V.; Obras Y Proyectos, S.A. de C.V.; Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. hereby certify that Grupo Mexicano de Desarrollo, S.A. is the corporate parent of the other named petitioners.

Grupo Mexicano de Desarrollo, S.A.'s non-wholly owned subsidiaries are:

GMD CBPO Construcciones, S.A.;
Consorcio Mexicano Constructor de Huites, S.A.;
Ecosys I, S.A. de C.V.;
Ecosys II, S.A. de C.V.;
Servicios Urbanos de Puebla, S.A. de C.V.;
Grupo Essagua, S.A. de C.V.;
Desarrollos Hidraulicos de Puebla, S.A. de C.V.;
Cooper T. Smith, S.A. de C.V.;
Carbonser, S.A. de C.V.;
Mexcarbon, S.A. de C.V.;
Desarrollos Hidraulicos de Guerrero, S.A. de C.V.;

Desarrollos Hidraulicos del Sureste, S.A. de C.V.;
Desarrollos Hidraulicos de Tam, S.A. de C.V.;
Desarrollos Hidraulicos de Aguascalientes, S.A. de C.V.;
Consorcio Ecoagua, S.A. de C.V.;
Operadora de Autopista del Golfo, S.A. de C.V.;
Autopista del Occidente, S.A. de C.V.;
Operadora de Autopista del Occidente, S.A. de C.V.;
Grupo Concesionario Metropolitano, S.A. de C.V.;
Vias Terrestres del Estado de Mexico, S.A. de C.V.;
Caminos Concesionados de Peajes de Morelos, S.A. de C.V.;
Compania Nacional de Concesiones, S.A. de C.V.;
Vias Concesionadas, S.A. de C.V.;
GIT Administracion de Autopistas, S.A. de C.V.;
Promotora Dowds, S.A. de C.V.;
Desarrollo de Infraestructura Y Vivienda, S.A. de C.V.;
Europlaza Mexico, S.A. de C.V.;
Inmobiliaria Real de la Presa, S.A. de C.V.;
Weinns Inmobiliaria, S.A. de C.V.;
Melinks de Mexico, S.A. de C.V.;
Grupo Promotor 2020, S.A. de C.V.;
Fideicomiso Grupo Diamante, S.A. de C.V.;
Fideicomiso Real Diamante, S.A. de C.V.;
Grupo Concesionario del Oeste, S.A.;
Latinoamericana de Ingenieria, S.A. de C.V.;
Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

Desarrollo de Infraestructura, S.A. de C.V.'s non-wholly owned subsidiaries are:

DINFRA Cofimex, S.A. de C.V.;
Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

Obras Y Proyectos, S.A. de C.V.'s non-wholly owned subsidiaries are:

OPSA Tenenge, S.A. de C.V.;
Obras Y Proyectos de Guatemala, S.A. de C.V.;
Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

Desarrollo Urbano Integral, S.A. de C.V.'s non-wholly owned subsidiaries are:

Autopistas de Guerrero, S.A. de C.V.

Desarrollo Industrial Latinoamericano, S.A. de C.V.'s non-wholly owned subsidiaries are:

Autopista del Sol, S.A. de C.V.;
Promotora de Autopistas del Golfo, S.A. de C.V.;
Grupo Mexicano de Desarrollo AENF;
Autopistas de Guerrero, S.A. de C.V.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. ——

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Petitioners,

- against -

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P. and THE VARDE FUND IV-A, L.P.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Grupo Mexicano de Desarrollo, S.A., *et al.*, by their counsel, respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit entered on May 6, 1998 (App. 1a-21a)[1] which affirmed the order

[1] "(App.)" refers to pages in the annexed appendix.

of the United States District Court for the Southern District of New York entered on December 23, 1997. (App. 22a-27a).

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit was entered on May 6, 1998 (App. 1a-21a) and is reported at 1998 WL 220954 (2d Cir. May 6, 1998). The order of the United States District Court for the Southern District of New York was entered on December 23, 1997. The order of the District Court has not been reported. (App. 22a-27a).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on May 6, 1998 (App. 21a) and this petition is filed within ninety days of entry of that judgment pursuant to Supreme Court Rule 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Rules 64 and 65 of the Federal Rules of Civil Procedure. (App. 60a-63a).

STATEMENT OF THE CASE

This appeal addresses the outer limits of a federal district court's power to issue a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 65") restraining a defendant's use of assets unrelated to the plaintiff's underlying claim. The facts underlying this appeal are, however, plain and uncontested.[2]

[2] The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because the amount in controversy exceeded $75,000, exclusive of interest and costs, and the action was between citizens of a state and citizens or subjects of a foreign state.

Defendants, a consortium of Mexican construction companies ("GMD"), issued unsecured notes, approximately $82,000,000 of which were purchased by Plaintiffs. Defendants defaulted on an interest payment on those notes. Plaintiffs accelerated their right to receive principal payments and filed a complaint in the United States District Court for the Southern District of New York (the "District Court") alleging breach of contract. (App. 5a). Plaintiffs also sought a preliminary injunction to restrain the Defendants from assigning or transferring their primary asset—the right to receive in excess of $300,000,000 of unrelated notes to be issued to Defendants by the Mexican Government.[3] (App. 4a-6a). In seeking the injunction, Plaintiffs argued that injunctive relief was necessary to ensure that Defendants, who had already assigned to certain Mexican creditors their right to receive a portion of the government notes, did not make further assignments that might frustrate a potential judgment for Plaintiffs.[4] (App. 6a). Plaintiffs also cited the possible insolvency of the Defendants as justification for the injunction. (App. 25a). There was no suggestion that the assignments in favor of the preferred creditors (which had all been at deep discounts) were on account of anything other than valid debts of GMD. (App. 5a-6a, 26a). The District

[3] GMD is scheduled to receive the government notes as a part of the Mexican Government's efforts to compensate construction companies which have sustained losses as a result of their building and operation of toll roads throughout Mexico.

[4] In fact, Plaintiffs did not merely seek to ensure that they would receive equal treatment relative to other unsecured creditors. Rather, after prevailing on a motion for summary judgment, Plaintiffs sought and obtained from the District Court an order dated April 17, 1998 ordering that Defendants irrevocably assign to Plaintiffs a sufficient quantity of government notes to satisfy Plaintiffs' judgment. (App. 58a-59a). Defendants have appealed the propriety of that turnover order to the United States Court of Appeals for the Second Circuit. That appeal is pending.

Court granted Plaintiffs' motion for a preliminary injunction (App. 26a) and Defendants filed a notice of appeal on December 23, 1997.

On appeal to the Court of Appeals for the Second Circuit, GMD challenged the District Court's authority to issue a preliminary injunction prohibiting GMD from transferring or conveying arbitrarily selected assets held outside of the court's jurisdiction. In fact, GMD has no assets within the United States. GMD did not contest the District Court's findings of irreparable harm or the likelihood that Plaintiffs might ultimately prevail on the merits.

Under Fed. R. Civ. P. 65, a district court may enjoin a defendant's use of specific assets only if the plaintiff has a claimed equitable interest in the exact assets it seeks to enjoin. Such an injunction is inappropriate in a suit seeking fungible money damages. Plaintiffs' sole recourse is under Rule 64 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 64") which requires a district court to follow state law attachment statutes.

In affirming the District Court's grant of Plaintiffs' motion for a preliminary injunction, the Court of Appeals for the Second Circuit joined the Courts of Appeal for the First, Third, Sixth, and Ninth Circuits in authorizing the use of Fed. R. Civ. P. 65 to enjoin a defendant's unrelated assets for the purpose of securing funds to satisfy a potential money judgment. (App. 9a-15a). The Court of Appeals for the Second Circuit recognized that the Courts of Appeal for the Fifth, Tenth and Eleventh Circuits have rejected the use of Fed. R. Civ. P. 65 to encumber a defendant's use of assets which bear no relationship to the plaintiff's underlying claim. (App. 13a). Those courts have held that such use of Fed. R. Civ. P. 65 constitutes an impermissible end run around the more stringent state law provisions mandated by Fed. R. Civ. P. 64 (App. 7a-13a). The Court of Appeals for the Second Circuit did not attempt to reconcile the obvious split among the circuits.

REASONS FOR GRANTING THE WRIT

This appeal raises fundamental questions about the power of the federal district courts to grant preliminary injunctive relief under Fed. R. Civ. P. 65 to restrain the use of assets which bear no relationship to the subject of the plaintiff's underlying claim for the sole purpose of preserving assets to satisfy a potential money judgment. This case presents the Court with an opportunity to resolve an issue that has been the subject of much contention among the federal circuits.

I. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

This case raised an issue of first impression in the Court of Appeals for the Second Circuit. (App. 9a). As the court explicitly recognized, however, various other Courts of Appeal have addressed the issue of the district courts' power to grant injunctive relief and have reached inconsistent conclusions. (App. 13a). In affirming the decision of the district court, the Court of Appeals for the Second Circuit followed the holdings of the Courts of Appeal for the First, Third, Sixth, and Ninth Circuits which have sanctioned the use of Fed. R. Civ. P. 65 to preserve unrelated assets to secure satisfaction of an ultimate judgment.[5] The Courts of Appeal for the Fifth, Tenth and Eleventh Circuits, however, disagree.[6] Those

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[5] *See In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994) *cert. denied*, 513 U.S. 1126 (1995); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 208 (3rd Cir. 1990); *Ebsco Indus., Inc. v. Lilly*, 840 F.2d 333, 334-36 (6th Cir.) *cert. denied*, 488 U.S. 825 (1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986).

[6] *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir. 1994) *cert. denied*, 513 U.S. 1146 (1995); *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990); *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988).

circuits have expressly prohibited the use of Fed. R. Civ. P. 65 to preserve arbitrarily selected assets to satisfy a potential money judgment, insisting that Fed. R. Civ. P. 64 and state law attachment provisions provide the only remedy for a plaintiff seeking to ensure that assets unrelated to the underlying action will be available to satisfy a potential judgment.

The conflict among the federal circuits has arisen as the result of divergent interpretations of three decisions of this Court, *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940); *DeBeers Consol. Mines v. United States*, 325 U.S. 212 (1945) and *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965).

In *DeBeers Consol. Mines v. United States*, 325 U.S. 212 (1945), this Court held that a preliminary injunction may issue to secure assets for a final judgment only if the assets to be restrained are related to the underlying action. In *DeBeers*, the government sought to enjoin the defendant diamond mining companies from selling, transferring or disposing of any property in the United States until the court could adjudicate the government's claims. The government predicated its prayer for injunctive relief on the grounds that "[t]he principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent an enforcement of any order or decree which this court may render." *Id.* at 215. In reversing the lower court's issuance of the preliminary injunction, this Court held that

> [a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit.

Id. at 220. The *DeBeers* court distinguished its prior holding in *Deckert*, in which the Court upheld an injunction restraining the defendant's use of specific property which was directly related to plaintiff's securities fraud claim and which therefore would have been the subject of a final decree—a trust of common stocks that was created with funds that the plaintiffs were allegedly fraudulently induced to pay. Similarly, in *First Nat'l*, the United States sought to foreclose on a tax lien that previously had been placed on the New York bank accounts of a foreign tax debtor—it did not sue for money damages. In reversing the Second Circuit's reversal of the district court's issuance of an injunction restraining the bank from transferring any of the assets it held for the account of the tax debtor, the Court found that the ultimate relief sought in the litigation involved the very same bank accounts and held that "[u]nlike *DeBeers* . . . there is here property which would be 'the subject of the provisions of any final decree in the cause.'" *Id.* at 385.[7]

Those courts which have sanctioned the use of Fed. R. Civ. P. 65 to preserve assets for an ultimate money judgment have held that the limitation on the district courts' power enunciated in *DeBeers* applies only to circumstances in which the remedy sought by plaintiffs is injunctive relief. Under this analysis, *DeBeers* is inapplicable to cases in which a litigant seeks only money damages. The Courts of Appeal for the Fifth, Tenth and Eleventh Circuits, however, have held that, under *DeBeers*, an injunction may issue only to restrain the same "*res*" or "thing" as is the subject of the plaintiff's underlying equitable claim.

As a result of this well-defined split among the federal circuits, forum shopping is likely and repetition of the issue contemplated by this appeal is certain.

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[7] Importantly, the Court issued the injunction pursuant to its equitable powers under 26 U.S.C. § 7402(a), not Fed. R. Civ. P. 65. In addition, the Court held that "courts of equity may . . . go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *First Nat'l*, 379 U.S. at 382-83 (citations omitted).

II. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE POWER OF THE DISTRICT COURTS TO GRANT PRELIMINARY INJUNCTIVE RELIEF

Fed. R. Civ. P. 64 provides that provisional remedies, such as attachment, may be ordered consistent with the law of the state in which the district court sits. State law attachment provisions in New York (and all other states) do not, however, permit the encumbrance of assets located outside the state. *See National Broadway Bank v. Sampson*, 179 N.Y. 213, 222 (N.Y. 1904) ("No state can subject to its law either real or personal property which is out of its jurisdiction."). The decision of the Court of Appeals for the Second Circuit (and the courts of appeal whose decisions it has followed) authorizes the district courts to circumvent state law provisional remedies statutes by simply calling what is, in essence, a prejudgment attachment, an injunction. As a result, there ceases to be any discernible purpose for Fed. R. Civ. P. 64. Litigants can easily circumvent Fed. R. Civ. P. 64 by relying on Fed. R. Civ. P. 65 and its less stringent standards to freeze provisionally an adversary's extraterritorial assets, in direct contravention of state law. By expanding the authority of the district courts to issue preliminary injunctions under Fed. R. Civ. P. 65, the Court of Appeals for the Second Circuit has enhanced the judgment enforcement powers of the federal courts compared to those of the state courts of the states in which they sit, frustrating the intent of the Federal Rules of Civil Procedure to conform federal judgment enforcement remedies to those contained in state law.

III. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE RIGHTS OF CREDITORS

The error committed by the Court of Appeals for the Second Circuit will have serious and broad-based implications in the area of creditors' rights. In ordinary business dealings, a company, even an insolvent one, is free to pay any of its *bona fide* creditors to the exclusion of others until the company seeks (or is compelled to seek) the protection of the bankruptcy code. The Courts of Appeal for the Fifth, Tenth and Eleventh Circuits have permitted market forces and the prerogatives of the indebted entity to dictate priority of payment. In those jurisdictions, district courts cannot use their injunctive powers under Fed. R. Civ. P. 65 to interfere with a debtor's right to determine which creditors get paid first.

However, in sanctioning the District Court's use of Fed. R. Civ. P. 65 to preserve a defendant's unrelated assets to satisfy a potential money judgment, the Court of Appeals for the Second Circuit has created a powerful weapon for creditors seeking to improve their position vis a vis other creditors. Creditors in the First, Second, Third, Sixth, and Ninth Circuits can seek injunctions under Fed. R. Civ. P. 65 to obtain additional economic leverage over the indebted entity by ensuring that no other creditor is paid until the claim of the creditor who has obtained the injunction is satisfied. Disfavored creditors are ordinarily unable to obtain relief except through the bankruptcy code. The "possible insolvency" of the debtor is insufficient.

The Court of Appeals for the Second Circuit (and the courts of appeal whose decisions it has followed) has, in essence, given the District Court the power to act as a bankruptcy judge over parties and assets not currently before it and not within its ultimate jurisdiction. That is the "status quo" which the challenged injunction sought to preserve. The injunction restrained the Defendants from using substantially all of their assets for any purpose. Moreover, the proceedings in the District Court made clear that not even the smallest part of the Defendants' frozen assets would be released without giving Plaintiffs prior notice and an opportunity to object. (App. 53a). None of the Defendants' other creditors enjoyed this luxury.

Fed. R. Civ. P. 65 is not a substitute for a preference action or a fraudulent conveyance claim, and it has never been used for the purpose of protecting the interests of one creditor over other legitimate creditors who are not even before the district court. To arm the district courts with the power to determine arbitrarily the rights of parties not before it would alter the economic expectations of creditors and would constitute a perversion of the district courts' power to grant injunctive relief.

IV. THIS APPEAL PRESENTS AN ACTIVE CASE AND CONTROVERSY

Plaintiffs filed a "Suggestion of Mootness" with the Court of Appeals for the Second Circuit contending that Defendants' appeal was moot because the District Court had entered final judgment in Plaintiffs' favor. That "Suggestion of Mootness" was rejected by the Court of Appeals by order dated May 4, 1998.

The preliminary injunction at issue in this appeal, which was in effect for four months (from December 23, 1997 through April 17, 1998), seriously impaired Defendants' ability to continue their operations in the ordinary course of business and to restructure their debts and other financial obligations. If the decision of the Court of Appeals for the Second Circuit is reversed, Defendants will be entitled to damages that it can show resulted from the wrongful issuance of the injunction. *See, e.g., H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17-18 (2d Cir. 1963). The determination of whether Defendants suffered damages requires first that this Court determine whether the injunction was improperly granted.

CONCLUSION

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: August 4, 1998

APPENDIX

APPENDIX

[Filed May 6, 1998]
[Entered June 3, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1812 August Term 1997

(Argued: Febuary 20, 1998 Decided: May 6, 1998)

Docket No. 97-9610

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

Plaintiffs-Appellees,

-v.-

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V.; and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants-Appellants.

Before: McLAUGHLIN, LEVAL, *Circuit Judges,* and POLLACK, *District Judge.**

Defendants appeal from an order of the United States District Court for the Southern District of New York

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* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

(Martin, *J.*), granting a preliminary injunction preventing them from dissipating, transferring, conveying, or otherwise encumbering the plaintiffs' right to receive or benefit from notes issued by the Mexican government. Because Judge Martin had the power to issue such an injunction and his findings are adequately supported by the record, we affirm.

AFFIRMED.

Richard A. Mescon, Morgan, Lewis & Bockius, New York, New York, *for Defendants-Appellants.*

Andrew J. Wertheim, Orrick, Herrington & Sutcliffe, LLP, New York, New York, *for Plaintiffs-Appellees* Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P.

Dale C. Christensen, Jr., Seward & Kissel, New York, New York, *for Plaintiffs-Appellees* Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc.

McLAUGHLIN, *Circuit Judge*

BACKGROUND

Grupo Mexicano de Desarrollo, S.A. ("GMD") is a Mexican holding company that, through its subsidiaries and joint ventures, constructs and operates roadways. From 1990 to 1994, GMD participated in the Mexican government's program to develop an intercity highway network. Under this program, the Mexican government granted concessions to build and operate toll roads to companies that were willing to arrange private financing for the construction of the roads. Due to economic uncertainty, currency devaluation and other factors, the revenues from toll road traffic fell below anticipated levels.

In February, 1994, in order to retire more than $100 million of high interest Mexican bank debt and to secure working capital to fund ongoing operations, GMD offered and sold to institutional investors $250 million of 8.25% notes due in 2001 (the "Notes"). The Notes are guaranteed by the five GMD subsidiaries named as co-defendants (collectively "Guarantors"). The Notes require GMD to pay interest at an annual rate of 8.25% on February 17 and August 17 of each year.

The Notes are "unconditionally and irrevocably" guaranteed by the Guarantors. Both the Notes and the Guarantees are unsecured obligations that rank *pari passu* with all other present or future unsecured and unsubordinated indebtedness of GMD. The Plaintiffs are eleven United States investment funds that purchased approximately $75 million of the Notes (collectively "the Investors").

Three years later, GMD experienced serious financial difficulty. In its annual report, filed with the SEC in June, 1997, GMD admitted that its liabilities now exceeded its assets. GMD expressed "substantial doubt" that it could

continue as a going concern. In August, 1997, GMD failed to make the interest payment on the Notes. The Guarantors similarly failed to step up and meet their obligations. Because of this default, the plaintiff-Investors caused acceleration of the principal.

Ten days later, the Mexican government came to the rescue by implementing the Toll Road Rescue Program. Mexico promised to issue government guaranteed Toll Road Notes to GMD and other toll road operators to reimburse them for unpaid construction receivables and expenses. In return for the Toll Road Notes, the Mexican government will eventually take over ownership and operation of the toll roads. Although the notes have not been distributed, GMD disclosed in its Third Quarter 1997 financial statement that it expected to receive $309 million in Toll Road Notes.

In addition to the debt owed to the Investors, GMD owed more than $450 million to other creditors. Its five largest creditors were the Mexican government, numerous Mexican banks, additional Mexican financial institutions, trade creditors, and terminated employees (collectively "Mexican Creditors"). Because the Mexican government's program would not fully alleviate its financial difficulties, GMD began to restructure its debt, reduce costs, and seek additional equity contributions. GMD undertook to negotiate with both the Investors and the Mexican Creditors to settle its financial obligations.

A Reuters report received by the Investors on August 27, 1997 revealed that GMD had begun to renegotiate its $256 million debt to the Mexican banks. GMD was asking for a 67% discount from the banks to match GMD's losses on the toll road investment. At the same time, GMD was also negotiating with the Investors to settle its obligations under the Notes.

One month later, the other shoe dropped. GMD issued a press release stating that during the first nine months

of 1997, it had revenues of approximately $119 million, but an expected loss of approximately $802 million. After totaling its assets and debts, GMD had a negative net worth of $214 million. To the alarm of the Investors, the press release also disclosed that GMB had already assigned $117 million in Toll Road Notes to settle other obligations—$100 million to the Mexican government to pay taxes and $17 million to pay severance packages to terminated workers in accordance with Mexican law. Although GMD did not have possession of the Toll Road Notes, it placed certain assets in "trust" for these creditors with the understanding that the encumbered assets would later be exchanged for Toll Road Notes.

On December 12, 1997, the Investors commenced an action in the United States District Court for the Southern District of New York (Martin, *J.*), alleging that GMD had defaulted on its obligation under the Notes. The Investors sought, *inter alia*, damages for GMD's breach of its contractual obligations under the Notes and a preliminary injunction restraining GMD from assigning the Toll Road Notes. By order to show cause, the Investors secured a temporary restraining order precluding the transfer or encumbrance of the Toll Road Notes. Judge Martin set a hearing on the motion for a preliminary injunction for December 19, 1997.

One day before the hearing, GMD filed its opposition papers. In an affidavit, GMD's Senior Vice President Jorge Zapata revealed that GMD had made additional, previously undisclosed assignments of $38 million in Toll Road Notes to the Mexican banks. The next day, during a break in the hearing before Judge Martin, the clouds further darkened. GMD gave the Investors a supplemental affidavit of Jorge Zapata stating that: (1) $137 million (and not the originally reported $100 million) in Toll Road Notes had been assigned to the Mexican government; (2) $30 million (not $17 million) in Toll Road

Notes had been assigned to former employees; (3) $48 million had been assigned to Mexican banks; and (4) $42.5 million had been assigned to other Mexican Creditors. Adding it all up, GMD had assigned between $214 million and $258 million of Toll Road Notes. GMD also planned to make still further assignments, leaving only $5.5 million in Toll Road Notes to satisfy the $75 million debt owed to the Investors.

Following a second hearing on December 23d, Judge Martin granted the preliminary injunction (under Fed. R. Civ. P. 65) restraining GMD and the Guarantors from dissipating, transferring, conveying, or otherwise encumbering the Investor's right to receive or benefit from the issuance of the Toll Road Notes. He determined that the Investors satisfied their burden for the issuance of a preliminary injunction because: (1) they would almost certainly succeed on their breach of contract claims against GMD; and (2) without the injunction they faced an irreparable injury since GMD's financial condition and its dissipation of assets would frustrate any judgment recovered. GMD now appeals.

DISCUSSION

I. *Power of the District Court to Enjoin the Use of Unrelated Assets*

GMD argues that, under Fed. R. Civ. P. 65, a district court is powerless to enjoin the use of a specific asset unless the plaintiff claims an equitable interest in the asset. Because the Toll Road Notes are unrelated to the Guarantee Notes on which the Investors brought suit, GMD contends that Judge Martin could not enjoin the transfer of Toll Road Notes. GMD believes that Fed. R. Civ. P. 64 is the only procedural mechanism to prevent a litigant from concealing or transferring assets in order to frustrate a potential judgment. The two Rules, however, are complementary, not mutually exclusive.

A. *Rule 64 and Rule 65*

Under Federal Rule of Civil Procedure 64, "all remedies providing for the seizure of the person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held." Fed. R. Civ. P. 64. The available remedies include arrest, attachment, garnishment, replevin, sequestration, and "other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action." *Id.* We have recognized that injunctive relief may be granted under Rule 64 if authorized by the applicable state law. *See In re Feit & Drexler,* 760 F.2d 406, 415 n.2 (2d Cir. 1985); *see also, Federal Deposit Ins. Corp. v. Antonio,* 843 F.2d 1311, 1313-14 (10th Cir. 1988) (enjoining use of assets under Colorado law); *cf. Chemical Bank v. Haseotes,* 13 F.3d 569, 572-73 (2d Cir. 1994) (affirming district court's denial of injunctive relief under N.Y. U.C.C. § 8-317(6)).

Federal Rule of Civil Procedure 65 establishes the procedure for securing preliminary injunctive relief in civil actions. The purpose of a preliminary injunction is to preserve the status quo between parties pending a final determination of the merits. *See Arthur Guinness & Sons, PLC v. Sterling Publ'g Co.,* 732 F.2d 1095, 1099 (2d Cir. 1984) (citations omitted). The court is vested with full discretion to determine whether to grant the injunction and its scope. *See Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944) ("An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.") (quotation omitted). However, we have noted that injunctive relief seeking to prohibit conduct outside of the district court's jurisdiction should be

"exercised with great reluctance." *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956).

All parties acknowledge that Judge Martin could not have enjoined the use of the Toll Road Notes under Rule 64 (and New York's injunction statute) because the Investors sought only monetary damages. Under New York law, "a preliminary injunction is . . . unavailable in an action for a sum of money only." N.Y. C.P.L.R. § 6301, Practice Commentaries (McKinney 1980) (Joseph M. McLaughlin) (citing *Campbell v. Ernst*, 19 N.Y.S. 123 (1892)). Furthermore, the use of New York's attachment statute would be unavailing because the Toll Road Notes are not located in New York State. *See National Broadway Bank v. Sampson*, 179 N.Y. 213, 222 (1904) ("No state can subject to its law either real or personal property which is out of its jurisdiction."); 12 Carmody-Wait 2d § 76.2, at 31-32 (1997) ("It is axiomatic that for property or a debt to be subject to attachment, the property must be amenable to the jurisdiction of the New York courts.").

The mere fact that the property lies outside the boundaries of New York State does not render the court powerless. If the court has personal jurisdiction over the defendant, and use of the court's injunctive power is appropriate, the court may order the defendant to bring the assets to New York or restrain the use of the assets. *See, e.g., Gresov v. Shattuck Denn Mining Corp.*, 215 N.Y.S.2d 98, 100 (N.Y. Sup. Ct. 1961) ("Where jurisdiction of the parties is assumed, this court may render an injunctive decree having extraterritorial effect in appropriate circumstances.") (citation omitted); N.Y. Jur.2d *Equity* § 14 (1986 & Supp. 1997) ("A court of equity may direct any defendant upon whom process has been served in New York to perform whatever acts are commanded in the decree, notwithstanding the fact that some or all of such acts may require performance outside of the

jurisdiction."); *cf. United States v. First Nat'l City Bank*, 379 U.S. 379, 384 (1965) ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States.") (citing *New Jersey v. New York City*, 283 U.S. 473, 482 (1931)). Therefore, Judge Martin had the power to issue the injunction.

B. *Standard of Review*

This Court reviews the district court's decision to grant a preliminary injunction for an abuse of discretion. *See Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 999 (2d Cir. 1997). The district court "abuses its discretion only if it applies an incorrect legal standard, bases the preliminary injunction on a clearly erroneous finding of fact, or issues an injunction that contains an error in its form or substance." *Id.* (citation omitted).

C. *Power of the District Court to Issue the Injunction*

This Court has approved the use of Rule 65 to freeze assets when those assets *are* the subject matter in dispute. *See Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986). Until now, however, we have not addressed whether the district court may issue an injunction to protect the plaintiff's right to recover monetary damages when there is a threat of defendant's insolvency or its dissipation of assets *not* directly involved in the pending litigation. The Supreme Court, likewise, has not squarely decided this question, although we read its precedents to suggest that a preliminary injunction should be available under those circumstances.

1. *Supreme Court Precedents*

GMD initially argues that *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945), bars the

use of preliminary injunctions to freeze unrelated assets in any case seeking only monetary relief. This is too sweeping a reading of *De Beers*.

In *De Beers*, the government sued several foreign corporations and individuals for Sherman Act violations. While the ultimate relief sought was a permanent injunction, the government sought a preliminary injunction restraining the corporate defendants from transferring assets outside the United States. The government sought this interim relief to preserve its ability to seek civil contempt fines if the defendants later chose to flout the permanent injunction the government sought. *Id.* at 215. The Court held that the motion should have been denied, reasoning that the preliminary relief sought dealt "with a matter lying wholly outside the issues in the suit." *Id.* at 220.

The *De Beers* Court noted that the district court lacked power under the relevant federal laws to enter a money judgment—the only authorized remedy was an injunction against "future continuance of actions or conduct intended to monopolize or restrain commerce." *Id.* at 219-20. Because there was no possibility of an eventual money judgment, the district court could not issue an injunction freezing the use of assets. The Court expressly distinguished *De Beers* from a situation where the injunction prevented the transfer of "a fund or property which would have been the subject of the provisions of any final decree." *Id.* at 220 (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)).

GMD contends that the Toll Road Notes are unrelated to GMD's obligations to the Investors. Therefore, their argument runs, the Toll Road Notes are a "matter lying wholly outside the issues in the suit," and their transfer cannot be enjoined. The actual scope of the *De Beers* holding is far narrower than GMD asserts. *De Beers* "simply held that a defendant's money may not be encumbered by a preliminary injunction when the final

merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs. In short, *De Beers* is simply inapplicable to cases in which a litigant seeks money damages." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 197 (3d Cir. 1990); *see In re Estate of Marcos*, 25 F.3d 1467, 1478 (9th Cir. 1994); *Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 561 (9th Cir. 1992).

Limiting *De Beers* to cases where final equitable relief is all that is sought comports with the Supreme Court's other pronouncements concerning the availability of injunctive relief. In *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), plaintiffs sought an order enjoining the defendant from disposing of any assets pending the outcome of their damage action for fraudulent misrepresentation. Plaintiffs alleged that the defendant "is insolvent and threatened with many law suits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion." *Id.* at 285. The Court sustained the injunction because:

> the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. . . . As already stated, there were allegations that [defendant] was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against [defendant], without recourse to the fund . . . would be inadequate.

Id. at 290.

More recently, in *United States v. First National City Bank*, 379 U.S. 378 (1965), the Court upheld a preliminary injunction freezing assets in a suit seeking payment of back taxes. Although there was statutory authority to grant an injunction, the Court painted with a broader brush:

> Once personal jurisdiction of a party is obtained, the District Court has authority to order it to "freeze" property under its control . . . .
>
> . . .
>
> The temporary injunction issued by the District Court seems to us to be eminently appropriate to prevent further dissipation of assets. . . . Unlike [*De Beers*], there is here property which would be "the subject of the provisions of any final decree in the cause." [citing *De Beers*, 325 U.S. at 220]. We conclude that this temporary injunction is "a reasonable measure to preserve the status quo." [citing *Deckert*, 311 U.S. at 290].

379 U.S. at 384-85. The preliminary injunction freezing assets was thus upheld in order to assure the enforceability of an eventual money judgment.

Deckert and *First National* endorse the district court's exercise of general equitable power to ensure the preservation of an adequate remedy. *See United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 (4th Cir. 1989) (affirming the issuance of a preliminary injunction preventing the dissipation of assets where the plaintiff alleged that the defendant was insolvent and its assets were in danger of dissipation; rejecting defendant's argument that attachment proceedings under Rule 64 were required; this construes "too narrowly the Supreme Court's approval of the exercise of general equitable power to protect a plaintiff's right to recovery") (citing, *inter alia*, *Deckert*, 311 U.S. at 285); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir. 1987) ("The authority of a trial court to issue a preliminary injunction to ensure the preservation of an adequate remedy is well established.") (citing *Deckert*, 311 U.S. at 290).

It now seems to be settled in equity jurisprudence that a preliminary injunction is available to protect the plaintiff's right to recover monetary damages when there is a threat that the defendant will become insolvent or dissipate assets. For example, in *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 189 (3d Cir. 1990), the Third Circuit held that a preliminary injunction was authorized in "extraordinary circumstances" in a suit seeking only money damages, such as when there is a possibility that the defendant would be insolvent at the time of judgment. Similarly, the First Circuit, in *Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43, 52-53 (1st Cir. 1986), held that it lay within the district court's power to enjoin the defendant from disposing of assets when there was a danger that the defendant would become insolvent prior to judgment. *See, e.g., In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994). Concededly, not all Circuits agree. *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520 (11th Cir. 1994); *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988).

2. *Second Circuit precedent*

Capitalizing on this split of authority, GMD maintains that this Court's case law is consistent with the minority view espoused by *Rosen*. None of our cases cited by GMD align us with the minority view.

GMD cites *Republic of Philippines* to support its argument that we have restricted the application of Rule 65. However, *Republic of Philippines* stands for the unremarkable propositon that a federal court may enjoin the transfer of assets that constitute the subject matter of the dispute. 806 F.2d at 356. It is utterly silent on whether a district court may enjoin the transfer of *unrelated* assets.

GMD's reliance on *In re Feit & Drexler*, 760 F.2d 406 (2d Cir. 1985), is also off the mark. In *Feit & Drexler*, the defendant appealed a district court's injunction ordering the defendant to turn all her property capable of delivery over to an escrow agent. *Id.* at 409-10. The

district court, ignoring Rule 65, had issued the injunction under Rule 64 and New York's injunction statute. The defendant argued that the district court should have applied Rule 65 (which could not have been satisfied). Refusing to decide whether Rule 64 or Rule 65 should have been applied, we simply held that "the district court committed no reversible error since its findings and conclusions amply satisfied both the state test and this Circuit's test for the granting of preliminary injunctions." *Id.* at 415. In a footnote, we noted that Rule 64 and state law might "perhaps [be] required" for a prejudgment freeze of assets:

> If the mandatory injuncton here is a "remed[y] providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," the district court's application of the New York standard was entirely proper and perhaps even required.

Id. at 415 n.2 (citations omitted). We qualified this dictum, however, by noting that Rule 65 was an "appropriate" mechanism for prejudgment freeze of assets under certain conditions:

> [E]ven where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant "intended to frustrate any judgment on the merits" by "transfer[ring its assets] out of the jurisdiction. . . . [T]his is an appropriate case for the issuance of injunctive relief to prevent [the defendant] from making uncollectible any judgment the [plaintiff] may eventually obtain against her. . . . [W]ithout injunctive relief an eventual money judgment was likely to be "ineffectual" . . .

Id. at 416 (citations omitted).

In light of the Supreme Court's precedents indicating the broad scope of a district court's power to grant in-

junctive relief, we "join the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment." *Estate of Marcos*, 25 F.3d at 1480.

We heed the Supreme Court's warning in *De Beers* that if injunctive relief is too freely granted, "[e]very suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree." *De Beers*, 325 U.S. at 222. We are confident, however, that this "parade of horribles" will not come tc pass. The defendant's rights are adequately protected because the traditional requirements for obtaining equitable relief must be met before a district court may issue an injunction. *See Hoxworth*, 903 F.2d at 197. We are also impressed by England's successful twenty-year history of issuing "Mareva injunctions" under circumstances substantially similar to those present on appeal. *See generally* Richard N. Ough, The Mareva Injunction and Anton Piller Order: Practice & Precedents (1987); Note, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. Pitt. L. Rev. 667 (1989) (discussing the value of Mareva injunctions and advocating that United States courts adopt similar rules for international commercial arbitrations).

II. *Irreparable Injury*

GMD contends that, even if Rule 65 applies, this Court requires that the defendants be acting with the intent to

frustrate an eventual judgment. Since Judge Martin did not specifically find that GMD intended to frustrate the Investors' right to receive an eventual recovery, the preliminary injunction was improper. GMD is wrong, as this would add a new mandatory element to equity jurisprudence.

It is by this time black-letter law that the party seeking a preliminary injunction must establish that: (1) absent injunctive relief, it will suffer an irreparable injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips in favor of the movant. *See Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994) (citations omitted). The showing of irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." *Citibank N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir. 1985) (quoting *Bell & Howard: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)).

GMD suggests that, in addition to the traditional requirements for a preliminary injunction, the movant must establish that the enjoined party harbored the intent to frustrate the recovery of an eventual judgment. This argument is without merit. The cases cited by GMD hold merely that one way to establish irreparable harm is to show that the defendant intended to frustrate the collection of an eventual judgment. *See, e.g., Pashaian v. Eccleston Properties, Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996) ("the irreparable harm requirement is satisfied in this case, which involves completed actions to frustrate a judgment"). We have never said that it is the only way and we decline to do so now.

Nor can GMD allege that Judge Martin abused his discretion by finding that the Investors would suffer an irreparable injury absent injunctive relief. Normally, in order to be classified as "irreparable," the threatened

harm must be a kind of injury for which a money judgment cannot compensate. *See, e.g., Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991). However, the district court may properly find that the threatened injury would be irreparable if, in the absence of an injunction, the movant would be unable to collect such a judgment. *See United States v. State of New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (judgment might be uncollectible because of Eleventh Amendment immunity).

Judge Martin found that the Investors would be irreparably harmed because "in light of Defendants' financial condition and dissipation of assets, any judgment Plaintiffs obtain in this action will be frustrated." Relying on *Chemical Bank v. Haseotes*, 13 F.3d 569, 573 (2d Cir. 1994) (per curiam), GMD contends that this is an insufficient showing of irreparable injury.

In *Haseotes*, we affirmed the denial of a motion for preliminary injunction restraining the defendant's transfer of assets. We held that irreparable harm does not exist merely because the defendant would render himself judgment-proof by engaging in the enjoined transaction. *Id.* We stated that an irreparable injury cannot be shown when the transferee legitimately sought to reduce debt and pay off creditors, rather than frustrate an eventual judgment. *Id.* at 573.

The plain import of Judge Martin's findings is that the actions of GMD were less than benign. He found that "GMD has stated that it plans to use the [Toll Road] Notes to satisfy Mexican creditors to the exclusion of Plaintiffs and all other holders of the Notes." This finding was adequately supported a statement from a GMD officer contained in the Confidential Appendix and a confidential payout schedule which indicated that, after the Mexican creditors were satisfied, GMD would have only

$5.5 million in remaining Toll Road Notes. Contrary to the legitimate business justification endorsed in *Haseotes*, Judge Martin clearly believed that GMD was improperly establishing a priority of creditors.

GMD's duplicity in disclosing the full extent of its assignments further supports this conclusion. GMD originally disclosed to the Investors that it assigned only $117 million in Toll Road Notes. During the course of the litigation, GMD revealed that it had actually assigned between $214 million and $238 million in Toll Road Notes. GMD's undisclosed transfers are not different in kind from the transfer of assets found to constitute an irreparable injury in *Pashaian v. Eccleston Properties, Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996) (pledge agreements that constituted part of an "unrelenting campaign to avoid paying obligations" and which left enjoined party without assets), and, again, in *Feit & Drexler*, 760 F.2d at 416 ("evidence of [defendant's] bond purchases and Swiss bank accounts, along with [the defendant's] repeated sworn testimony that she had no such assets" sufficient to justify issuance of injunctive relief).

It is particularly disingenuous for GMD to raise this argument on appeal. Judge Martin instructed the parties to prepare jointly a proposed order granting the preliminary injunction. GMD specifically objected to the proposed finding of fact that GMD's dissipation of assets would frustrate the Investor's ability to recover an eventual judgment. GMD argued that this finding "go[es] beyond what is sufficient to support an injunction." GMD should not be heard now to argue that this finding does not sufficiently support the injunction.

CONCLUSION

We have considered all the arguments raised by appellants and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

[Filed May 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANG III
Clerk

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of May, one thousand nine hundred and ninety-eight.

Present: HON. JOSEPH M. MCLAUGHLIN
HON. PIERRE N. LEVAL
Circuit Judges
Hon. MILTON POLLACK
District Judge*

Docket No: 97-9610

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* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

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Defendants-Appellants.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

By: /s/ Beth J. Neador
BETH J. NEADOR
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

DATE: May 6, 1998

Re: Alliance Bond Fund v. Grupo Mexicano De

Docket No(s).: 97-9610

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

AFFIRMED

Judgment was entered on *May 6, 1998,* and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form is enclosed herewith, and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17(8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours

GEORGE LANGE III, Clerk

By: /s/ Sheila E. Wilson
SHEILA E. WILSON
Case Manager, USCA

[Filed Dec. 23, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

WHEREAS, on December 12, 1997, Plaintiffs commenced this action by filing their Complaint seeking, among other things, a preliminary injunction prohibiting Defendants from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any Defendant's right to, interest in, title to or right to receive or retain any of the rights, receivables, notes or any other form of consideration, distributed or to be distributed to Defendants or Defendants' designees pursuant to the toll road ("Toll Road") rescue

plan established by the United Mexican States Ministry of Communications and Transportation under a decree dated August 27, 1997 (the "Government Notes");

WHEREAS, on December 12, 1997, this Court issued a Temporary Restraining Order, pending the determination of Plaintiffs' application for a preliminary injunction, prohibiting Defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any Defendant's right to, interest in, title to or right to receive or retain any of the Government Notes or proceeds thereof, and

WHEREAS, by Order To Show Cause signed by the Court on December 12, 1997 ("OSC"), the Court ordered that Defendants show cause before this Court on December 19, 1997, why the requested preliminary injunction should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure; and

WHEREAS, on December 19, 1997, this Court held a hearing on Plaintiffs' application for a preliminary injunction.

NOW, THEREFORE,

Upon consideration of the papers and evidence submitted by the parties, and the arguments of counsel, and all prior proceedings had herein, the Court finds that:

Defendant Grupo Mexicano de Desarrollo, S.A. ("GMD") is a Mexican holding company engaged in the construction business with its principal place of business at Carretera Mexico-Toluca 4000, Cuajimalpa, D.F. 05000 Mexico;

Defendants Desarrollo de Infraestructura, S.A. de C.V., Obras Y Proyectos, S.A. de C.V., Desarrollo Urbano

Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V. (collectively, the "Guarantors"), are Mexican corporations with their principal places of business at the same address as GMD, and are GMD's principal construction subsidiaries;

The OSC was duly served upon Defendants as provided therein, and Defendants, by their Legal Representative, Jorge Zapata, and their counsel, Morgan, Lewis & Bockius, have appeared to defend this action;

The Court has personal jurisdiction over each of the Defendants and venue is proper in this District;

On February 17, 1994, GMD issued $250 million of 8¼% Guaranteed Notes Due 2001 ("Notes");

The Notes are a valid corporate obligation of GMD that rank *pari passu* with all other present or future unsecured and unsubordinated debt of GMD;

The Guarantors unconditionally and irrevocably guaranteed the Notes;

Plaintiffs are U.S. investment funds and the beneficial owners of a total of $75,006,000 principal amount of the Notes;

The Notes bear interest at an annual rate of 8¼ percent, payable semi-annually in arrears in U.S. dollars on February 17 and August 17 of each year;

Defendant GMD failed to make the interest payment due on August 17, 1997, within five business days thereof, and has never made this payment;

The Guarantors have not paid the interest payment due on August 17, 1997;

An Event of Default of the type specified in Paragraph 7(a)(i) of the Note instrument has occurred and is continuing;

Plaintiffs have duly accelerated the maturity of the Notes beneficially held by them;

As of December 12, 1997, GMD and the Guarantors, jointly and severally, were indebted to Plaintiffs in the amount of $80,194,054, representing $75,006,000 in principal amount plus $5,188,054 in accrued and unpaid interest;

All conditions precedent to Plaintiffs' claim for breach of contract and the granting of the judgment requested have either occurred, been waived by Defendants or otherwise been satisfied, and Defendants have offered no defenses thereto;

Defendant GMD stated in its 1997 Report on Form 20K, filed with the United States Securities and Exchange Commission on June 30, 1997, that its ability to continue as a going concern is in substantial doubt;

On October 28, 1997, Defendant GMD reported that, for the first nine months of 1997 (based upon Mexican Generally Accepted Accounting Principals), it had a net loss of approximately $802 mililon, and a negative net worth of approximately $214 million;

Defendant GMD also reported that its current liabilities exceed its current assets;

Defendant GMD, in addition to the Notes, has in excess of $450 million of other creditor claims;

Given GMD's questionable ability to continue as a going concern, its continuing losses from operations in 1997, its negative net worth, its debt load and its inability to pay, as evidenced by the default on the Notes, its debts as they become due, GMD is at risk of insolvency if not already insolvent;

GMD has stated that it expects to receive at least $309 million of the Government Notes;

According to GMD's balance sheet as of September 30, 1997, the Government Notes represent 72 percent of its total current assets and 42 percent of its total assets;

The Government Notes thus are GMD's only substantial asset;

GMD has stated that it plans to use the Government Notes to satisfy its Mexican creditors to the exclusion of Plaintiffs and other holders of the Notes;

GMD has stated that it has encumbered certain Toll Road assets ("Receivables") for the benefit of certain Mexican creditors by placing Receivables in "trust" for those creditors, or otherwise assigning or encumbering such Receivables, with the intent that those specific Receivables will be exchanged for Government Notes once the Government Notes are issued;

In light of Defendants' financial condition and dissipation of assets, any judgment Plaintiffs obtain in this action will be frustrated;

Plaintiffs have thus demonstrated that, in the absence of the requested preliminary injunction, they will suffer irreparable injury and do not have an adequate remedy at law;

Moreover, the probability that Plaintiffs will succeed on the merits of their underlying claim for breach of contract is almost certain;

Alternatively, Plaintiffs have raised sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tips decidedly in Plaintiffs' favor. Consequently,

IT IS HEREBY FURTHER ORDERED that, pending disposition of this action, Defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, are ENJOINED and RESTRAINED from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any Defendant's right to, interest in, title to or right to receive or retain, any of the Government Notes;

It is FURTHER ORDERED that nothing contained herein shall prohibit the defendants from commencing any insolvency proceedings under any applicable law.

Dated: New York, New York
December 23, 1997

/s/ John S. Martin, Jr.
UNITED STATES DISTRICT JUDGE

[Filed Dec. 12, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-v.-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

OPINION AND ORDER

JOHN S. MARTIN, Jr., District Judge:

In connection with the Court's order today granting a preliminary injunction against defendants, the Court orders that the plaintiffs post bond of $50,000.

SO ORDERED.

Dated: New York, New York
December 23, 1997

/s/ John S. Martin, Jr.
JOHN S. MARTIN, JR.
U.S.D.J.

[Filed Dec. 19, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., *et al.*,

Plaintiffs,

v.

GRUPO MEXICANO DE DESARROLLO,

Defendant.

December 19, 1997
9:50 a.m.

Before:

HON. JOHN S. MARTIN, JR.,

District Judge

* * * *

APPEARANCES

ORRICK, HERRINGTON & SUTCLIFFE
Attorneys for Elliot Associates LP
Avalon Total Return Fund, The Varde Funds

BY: ANDREW J. WERTHEIM,

BY: DUNCAN N. DARROW

SEWARD & KISSEL,
Attorneys for Plaintiff Alliance Bond Fund, Inc. et al.

BY: DALE C. CHRISTENSEN, JR.,
BY: JOHN J. GALBAN

MORGAN, LEWIS & BOCKIUS, LLP
Attorneys for Defendant

BY: RICHARD A. MESCON,

BY: GERALD M. FREEDMAN,

BY: JOHN E. FAILLA

[2] (In open court)

MR. WERTHEIM: Good morning, your Honor, my name is Andrew Wertheim, with Dale Christensen, who represents the Alliance Funds. We represent Elliot Associates, the Avalon Fund and the Varde Funds.

MR. CHRISTENSEN: Your Honor, I am going to share my argument with my colleague, since he's representing some different funds. And I will try to deal with the opening remarks, if I might, from the podium.

THE COURT: Sure.

MR. CHRISTENSEN: The relief we are asking here, your Honor, today is the same relief articulated in our papers seeking the order to show cause.

What we are asking, in addition to the relief sought therein, and that the Court was prepared to grant, is not only a continuance of those restraints, but also a direction by this Court to the defendants that they place the government notes that are about to be received by them, in some kind of trust established in accordance with Mexican law. And approved by this Court.

This trust, contrary to the suggestions—

THE COURT: I am going to start running things in Mexico?

MR. CHRISTENSEN: You are not going to be running things in Mexico. What you are going to be doing is using [3] the personal jurisdiction this court has over the parties with whom we have contracted to get them to do certain things, which we believe are not exclusively in our interest, but in the interests of all parties.

And I want to focus on that, if I might, because I think one of the important issues and sensitivities for

this Court is something that we tried to be sensitive to in terms of drafting the relief here. We are not asking this Court to become activists in Mexico, what we are asking is that a level playing field at least be permitted to be established in Mexico so that we can fight for our rights properly in Mexico, in the same way that any other creditors could.

We cannot do that at that point in time because of limitations under Mexican law, which are established in the affidavits we submitted in connection with our motion for a preliminary injunction.

We are not trying to establish any kind of possessory right in the assets in question here. And for that reason we believe a lot of the discussion regarding the relative merits of seeking an application for an attachment as opposed to a preliminary injunction are incorrect. And we believe also, and would ask the Court to focus on what we believe is the most dispositive authority on this issue, and that is Judge Sweet's decision in the Mason Tenders case, [4] which your Honor may have already read.

We believe that the law in that case makes clear that what we are doing here in terms of preliminary injunctive relief is totally appropriate. And, moreover, we believe that the standards that are established in this circuit are clearly met.

One of the most, I think, telling things in terms of the opposition papers which we received very late last night, was that there was really absolutely no contest on the issue of the fact that we are entitled to a judgment, or will be entitled to a judgment.

There has clearly been a default of substantial magnitude in the interest payments alone in August. The debts in question have concededly been accelerated and are currently due, and there is not a whisper of any kind of payment in progress.

Indeed, what we have is an acknowledgement by the defendant's attorneys that the same document which is attached as Exhibit, I believe, K to the Cramer affidavit, which they contend was a proposal submitted to us, and which we dispute that fact, indicates in the English translation that when all of these government proceeds are disbursed to the various Mexican creditors, that there will be a mere 5.5 million left for other creditors. And we are certain that the bond holders here are not the only creditors.

[5] So we believe that in terms of the standards in this circuit on the issue of probability of success, that these clearly have been met.

We also believe that irreparable harm can clearly exist. And the standard, again I would refer your Honor to Judge Sweet's decision in the Mason Tenders case, which is as recent as May of this year, establishes that irreparable harm, as we've demonstrated, is present in this instance. It is clear that the defendants are going to be unable to satisfy any money judgment that's submitted.

Indeed, in their most recent form 20(f), which they filed before the Securities & Exchange Commission, because this was a Eurobond offering, they state in that, and this is quoted at page 2 of our initial memorandum of law, the company's current liabilities exceed its current assets—

THE COURT: —I read the papers.

MR. CHRISTENSEN: And we believe that that establishes the predicate for insolvency. So we feel that the standards for a preliminary injunction is, as articulated by the Second Circuit, are clearly met here.

THE COURT: Mr. Mescon.

MR. MESCON: Good morning, your Honor.

Three points, I will just list them as topic notes first and then go into each one.

[6] First, Rule 65 does not authorize the Court to issue a preliminary injunction under the facts of this case.

Second, the delay of the defendants and their use of this Court's injunctive power as a ploy and negotiation belies the—

THE COURT: —any defense to their claims on the notes?

MR. MESCON: I have no idea—the hours since I learned of this, and I have been working on injunctive papers, on the pace—there have been notes that are not paid—

THE COURT: —appears to be a judgment—

MR. MESCON: —and this Court has jurisdiction over this action—that action. And there is certainly a good chance that in due course this Court will enter judgment for $75 million. And that judgment can take it to Mexico—

THE COURT: —and if they had a judgment they could get a restraining order, could they not?

MR. MESCON: In Mexico, I don't know the answer.

THE COURT: Here. If a party with personal jurisdiction here could be subject to a restraining order that doesn't allow them to dissipate their assets.

MR. MESCON: There are no assets in this jurisdiction in this—

[7] THE COURT: —the restraining order would restrain them from taking any action.

MR. MESCON: Right, and—

THE COURT: —anywhere.

MR. MESCON: And postjudgment, that could be the case, perhaps.

THE COURT: So that's the case postjudgment. We have got a case where there is no defense presented, why shouldn't I be able to provide them with the same relief?

MR. MESCON: Because, number one, your authority is limited by Rule 65. And while you might be able to issue an attachment under New York State law, an injunction, and a claim for money damages only, does not lie under these facts.

Second, the claim for irreparable injury does not justify the award of an injunction. And, third, there are lots of other parties over whom this court does not have jurisdiction—

THE COURT: —they are asking me to fashion a remedy that will protect those people's rights. They are saying, we got a debtor here who is absolutely liable to us, presents no defense, and the debtor wants to—

MR. MECON: —your Honor, they—

THE COURT: —you got to wait for me to stop, Sandi gets very annoyed. You don't want to get her mad at [8] you.

MR. MESCON: The notion that the debtor is going to dissipate the assets is not established here. The document which they rely on, which is a 408 document, given in the context of settlement discussions, was a proposal to them, it was a proposal that contained in it a requirement of their agreement before the transfers would take place. There is no notion of anybody going out in the dead of night and reassigning things.

The principal assignment of these notes, about which they complain, occurred in August of 1997, was disclosed in a public release in August of '97. For four months that hundred million dollar assignment has been known. The defendant—plaintiffs were well aware of it.

During the course of the negotiations the plaintiffs decided, essentially, to try and crank up the heat a little bit and have already, as of this moment, essentially prevented the defendants from disposing of what could be hundreds of millions of dollars for the purpose of running its ongoing operations. There is no capacity at all, the entire—a very substantial part of the cash flow of the defendants, like a Chapter 11 in Mexico, we've got the whole thing closed down, and it has been for a week. None of theses funds could be assigned, when they are received, they can't be spent. And what we have is a [9] situation where this court is going to be required to make decisions about whether wages can be paid, whether certain ongoing operations can be made, that really are not within the jurisdiction of this court. The other parties aren't before this court.

The Mexican FDIC, "fro pro ra bre" I think is how they say it, is not before this court. And this court has a contract action, it ought to decide it. And then judgment will be entered.

The Court's judgment will be entered and things will follow in the ordinary course.

To suggest that we are dissipating assets, the way that happened in Marcos, that we are stealing in the dead of night, this isn't so. There are ongoing negotiations, professional advisors on both sides, meetings are scheduled for early January, proposals and counterproposals have been exchanged. You see them attached as exhibits to our affidavit. Nothing being done on the sly, nothing is being done in a way to whisk away assets.

The authority of this court to protect rates, eventually judgment, is really designed for those situations where somebody is doing something, that's small W, wrong.

THE COURT: It seems to me that when you are dealing with the court's equitable power in this area, that

there is a balancing of factors that gets taken into [10] account.

If there were a serious question on the merits here, then perhaps the nature of the relief would require the Court to proceed with perhaps more caution. But when you have a situation where there is no defense on the merits, in an order that could clearly be entered, in my view, and you can disabuse me of that, if there were, in fact, a judgment, why should I delay entry of that judgment simply because the debtor is going to try to use the process of the court to delay entry of a judgment as to which there is no defense? Why is that equitable?

MR. MESCON: I guess first, the first response, is there a question about whether the court's equitable power reaches to a preliminary injunction when there is a claim for money damages only in this case. Leave that aside, that's in the papers. Second point, is—

THE COURT: —I think I have entered a judgment in those situations. When there has been a showing that the debtor is not going to be in a position to make payment.

MR. MESCON: When the subject matter of the dispute related to the action before the Court, perhaps, there was a breach like in the Marcos case, $5 billion, the subject was who owned them.

I don't know—but whether your Honor has done so, when the fund that has been attached bears no [11] relationship to the action that was before the court, and when the property was not within the state or the country.

THE COURT: Anyone my age relying solely on their memory is in jeopardy of error. My memory is that I have done it.

MR. MESCON: In addition, your Honor, that in this case, what the effect of the preliminary injunction

that's being sought here would be, would be to amount to a disruption of the orderly flow of the, what may amount to insolvency proceedings, or bankruptcy proceedings, or work out of one kind or another with all of the parties involved.

It's as if one of the parties, one of the many parties with an interest here, those parties include Mexican creditors, Mexican government, the Mexican people, the Mexican FDIC and the taxing authorities in Mexico, all have an interest in this, and for the last few months with the defendant—the plaintiffs' participation have been discussing and working through these issues.

Now, one of the parties now disrupts that orderly flow—

THE COURT: —possession is nine-tenths of the game. The defendants say we have the money and if you don't do what we want you to do, we are going to give that money to somebody else and leave you high and dry.

MR. MESCON: We haven't said that, your Honor, [12] the defendants have not said that.

And the documents that are attached to the moving papers, which was a settlement negotiation document, was—is not—is a proposal, it is not a statement of what we are going to do; hey, guys, this is our suggestion, what is your reaction to it. That's what that document was.

Indeed, the proposal of the other side is to set up what is called an appropriate Mexican trust. And the proposal involves five trustees, three of whom are not from either the plaintiff or defendant in this action.

How the Court will direct that the Mexican FDIC appoint a trustee to supervise in part the trusts that this Court might set up, are things that just shouldn't be done here.

There is an action here that there could be a judgment here. But essentially the reorganization proceedings,

which is what we are talking about, what we do in the equivalent Chapter 11 reorganization of a troubled company, is not something that ought to be under the supervision of this Court.

THE COURT: Suppose I simply enter an order that they are not to dissipate any funds other than in the ordinary course of business operations.

MR. MESCON: And limit it to the amount demanded in the complaint, with the interest that's accrued? Because [13] the Court's present order extends far beyond the ad damnum in the complaint.

May I have a moment, your Honor?

(Pause)

THE COURT: Sure.

MR. MESCON: We would recommend to our client that it accept that proposal.

THE COURT: Let me hear from the plaintiffs why that isn't sufficient under the day.

MR. WERTHEIM: Your Honor, it would be sufficient under the day, with one exception, the ordinary course of business we have to be careful. They have taken the positions in their papers already, your Honor, that the tax dissipation, the employee lien dissipation, and the emergency bank loan dissipation, have all been in the ordinary course. But what's behind each of those, the tax claim for 100 million was in settlement of a larger—

THE COURT: —let me suggest this, I have some people waiting for me on another matter, why don't you talk to each other and see if you can put that concept in mind. Work out some agreement.

It seems to me something that provides, and you can deal with ordinary course of business, it seems to me any transaction in excess of a certain amount would not be ordinary course. And that before any such transac-

tion would [14] take place, parties will be given adequate notice to come to court and we can deal with it on that basis.

MR. WERTHEIM: May I also suggest they look to their cash flow first before—

THE COURT: —talk to each other, see where you come out on that general concept. It does seem to me that this is a situation where the plaintiffs are entitled to some protection. On the other hand, there are more than the plaintiffs who are involved, and may ultimately end up in insolvency proceedings in Mexico.

I am not going to run Mexico from here. If I have to do that we will go down there. We are getting to that time of year where it will be pleasant.

MR. MESCON: We have to make sure the water in Cancun is still fresh.

THE COURT: I travel with my own water when I leave the country.

MR. WERTHEIM: Thank you, your Honor.

THE COURT: And why don't you come back to me after you have talked.

MR. CHRISTENSEN: Your Honor, may we stay here and have this discussion?

THE COURT: Sure, use the jury room.

(Recess)

THE COURT: Good afternoon. Where do we stand?

[15] MR. CHRISTENSEN: Your Honor, my name is Dale Christensen of Seward & Kissel.

We wanted to report that we discussed, at considerable length, this afternoon, with Mr. Mescon and his colleagues, the attempt to resolve this matter upon some kind of consent agreement. We consulted in good faith. I think it is fair to say that counsel made an effort, and

we were able in many instances to narrow areas of disagreement. But, unfortunately, during the course of the discussions we found out that, at least from our vantage point, the facts were, in fact, worse than we had expected. And we are, regrettably, not in a position to enter into such a consensual agreement.

We would, your Honor, urge the Court to enter an order.

And I believe Mr. Mescon might want to make some statement.

MR. MESCON: I believe counsel submitted a form of order. During the course of the day we had learned some slightly different factual information which we proposed to submit to the Court in a supplemental affidavit that we will serve, probably on Monday.

But summarizing it briefly, the gross amount to be distributed rather than being 305 million is 329 million. And the total amount of assignments that have been made [16] prior to the entry of the Court's temporary restraining order were a gross amount of 256 million, which was made on account of $214 million net of liabilities. So the balance remaining, as we understand it, is $53 million in notes gross, but 95 million in notes net after over-assignments are returned from taxing authorities and others.

Also, with regard to the form of the—form of the preliminary injunction, we believe, of course, believe that no preliminary injunction should be entered for the reasons set forth.

If your Honor is inclined to continue the temporary retraining order pending your determination of the preliminary injunction motion, we would propose that that temporary restraining order be modified so as to permit transfers in the ordinary couse of business to be defined merely as, with the approval and consent of the other side. And failing that, bringing the matter to your Honor's

attention rather than the blanket bar that exists in the proposed order that is being submitted to the Court.

MR. CHRISTENSEN: Your Honor, in that regard, I just want to make a few points. And your Honor may want to ask us some questions.

We do not favor having any exception for ordinary course transactions. Frankly, some of these additional assignments we found, which were very troubling, are not [17] assignments that we believe comply with the agreements. We are concerned that that kind of activity is continuing and, indeed, from our perspective, it makes the need for this injunctive relief all the more important and all the more imminent.

And we feel that any exceptions, other than in terms of ordinary course transactions, for these particular funds, which I might remind the Court, were designated to pay creditors, or any exception in terms of the amount that is covered by this, other than the amount that the government notes themselves total, we feel that perhaps encourages some more of these types of assignments, as my colleague used, which we frankly feel are violative of the agreement, and are the very kinds of things that we wanted to discourage from happening.

They're the types of transactions that are effecting the level playing field that we hope will be found by your Honor entering a preliminary injunction in the form that we recommended, which would include setting up some kind of fund that they, in turn, would have, you know, significant influence on. And it would be held in Mexico. But it would at least guarantee that the amounts of money in there would not be assigned over to other creditors, or other preferred creditors. In fact, we recognize your Honor may wish to enter its own order. We have prepared a draft [18] order and we have it on disk. And I can hand it up to the Court at this time.

THE COURT: Sure.

MR. CHRISTENSEN: And we have given a copy to our adversary.

THE COURT: Mr. Mescon, let me hear your comments.

MR. MESCON: First of all there are a number of the proposed findings of facts that are contained in the proposed order with which we take issue.

In reading it over the last five minutes, one that jumps out is on the top of page 5, in which the findings made that the note shall be secured equally and ratably with or prior to such indebtedness with certain exceptions, are not relevant here. We believe the exceptions are very relevant since principal asisgnment was for taxes, which we believe is one of the exceptions referred to in the order.

There is, I believe, other language in the proposed findings of facts that go well beyond what is either necessary for the determination of this motion or which—as to which there has been appropriate presentation of evidence in connection with the motion.

Leaving aside the proposed findings of fact for a moment, I believe that the decretal paragraph of the order, [19] number one, causes an undue hardship, is not limited to the minimum necessary to effectuate the purposes—

THE COURT: —what would do that?

MR. MESCON: That is balancing the hardships, a provision that would permit the defendant to continue to function, assuming your Honor were inclined to grant—

THE COURT: —counsel makes the point that these notes were not, these government funds were coming in, were to satisfy creditors, not to be operating funds.

MR. MESCON: That is a—the two points responsive to that, first, creditors mean all kinds of creditors. And the funds that are received are being used entirely appropriately in that regard.

And, second, it is impossible for the company to continue to function without access to some of these funds. And what that will be doing here, if this injunction is entered, is essentially precipitating, this may be the intent of plaintiffs, I don't know, but precipitating the insolvency—the bankruptcy of the defendants either in a Mexican bankruptcy proceeding or through repeated preliminary injunction applications in this court, with respect to the terms of the trust.

I think also the decretal paragraph with respect to an appropriate Mexican trust is, with respect, beyond the competence of the Court. The Court is not learned in [20] Mexican law. The trust—

THE COURT: —how do you know that?

MR. MESCON: I believe—I said with respect.

THE COURT: That assumes a fact not in evidence. It happens to be true.

MR. MESCON: The proposed form of trust, which is attached to the moving papers, provides a group of five trustees, three of whom this court does not have jurisdiction over.

This court does have jurisdiction over the trustee from the defendant and the trustee from the plaintiff, but there are trustees from Fobrick Proba, there are trustees from other creditors that are in the proposed form of trust that the defendants have—the plaintiffs have proposed that are not before this court.

This Court, I don't think, could compel them to serve as trustees.

The notion of this Court managing a trust in Mexico is not as an efficient use of either this Court's time or sensible in types of comity between the Court of the—of this court and in Mexico.

What really is, as the negotiations go forward over the next 30 days, the courts in Mexico sensibly are closed

till New Year's, so nothing is going to happen down there over the next two weeks. But as the—

[21] THE COURT: —more reason we should handle it, since we will be here. Mrs. Thomas never stops working.

MR. MESCON: We suggest that what we are going to have here is a deep involvement of this Court in what I anticipate will be a continued series of applications with regard to this subject matter. Unnecessarily.

I think that if we were—if the Court were inclined to grant a preliminary injunction, which again, we propose, if the order were to be more limited in the form of a restraint, like the temporary restraining order, with an exception in some form for ordinary course expenditures, that would be easier for the Court to enforce because the Court does have personal jurisdiction over the defendants and would not involve the Court in the operation and supervision of the Mexican law trust.

THE COURT: How would you define ordinary course?

MR. MESCON: Ordinary course would be defined as—the thought I had in mind is something not unlike what the United States bankruptcy code defines it as, would not be preferenced under our bankruptcy code, with a release valve that if there was ever a disagreement, then the Court could decide on some kind of basis, or a referee appointed by the Court, if the Court didn't want to do it himself. There are ways to do it that I hadn't really thought out, but something—

[22] THE COURT: —you think I prefer trying narcotics cases—

MR. MESCON: I dare say, after the third one you wouldn't want to entertain the application, what's the ordinary course.

There are some ways that would give a little more wiggle room for the defendant as it goes forward trying

to work this thing out over the next 60 days, which is really what, as a practical matter, this is won in 60 days, this would be all over, or—whether there will be a full-blown bankruptcy proceeding, or working it out.

MR. CHRISTENSEN: Your Honor, we are not trying to engage the Court in some kind of extraterritorial proceeding. All we are asking, if you look at the last paragraph, is that the defedants be directed to set up a trust in compliance under Mexican law. And all that this Court's involvement is is to approve the ultimate form of that, which we hope will have some consultations on. And as Mr. Mescon already probably knows, these types of trusts are not unusual. Indeed, we believe that some of the other creditors have been preferred, have been the beneficiaries of these types of trusts. So we are not talking about anything very monumental.

We are very concerned about this ordinary course loophole, because it seems to us, based on the history that [23] the position that they are advocating today, this loophole is large enough to drive trucks through, it is really interpreted by the defendants in a very broad way. And we have to, from our perspective, put an end to that.

The Mexican government in its bailout of these companies intended these funds, and I'd like Mr. Darrow, who is actively involved with the transaction, to just speak to that, to be used for creditors. It was not meant to be used for the operating budgets, they have other sources of revenue, they receive $10 million a month in terms of operating revenues, they are still in a position to run their business.

THE COURT: Let's assume they receive $10 million a month, and they have $12 million of bills, it seems to me they end up with $2 million in new creditors.

MR. CHRISTENSEN: That's true, your Honor.

THE COURT: And if those new creditors are supplying goods that are necessary to keep the company operating, it is essential that they be paid.

MR. CHRISTENSEN: Your Honor, we are not disputing that. And one of the reasons we've, you know, sought relief that does not just directly benefit us, but benefits, you know, the whole class of creditors, is to merely put ourselves in a position where we are treated equitably with the other creditors.

[24] What has happened to date, is that our investment interest in these companies has been discriminated against. And the only way we can protect ourselves is getting some kind of compulsion from this Court that the defendants who contracted with us, agreed to subject themselves to the jurisdiction of this Court, will at least treat us on an even playing field with the other creditors. That's all we are asking for.

MR. DARROW: Your Honor, if I could speak briefly. Duncan Darrow.

First of all, in terms of the—in the record as an attachment to our affidavits is the company's third quarter results for this year, 1997, financial results, which show for the third quarter of this year revenues of about 36 U.S. million dollars, about $10 million a month. So the company has some—

THE COURT: —that means nothing unless I know what the expenses are. People who make $133,000 a year, is a significant amount of revenue. But I will show you my expenses and prove to you it is not.

MR. DARROW: Secondly, in the defendant's affidavit in opposition to this motion, they talk about the fact that, quote, the controlling stockholders of this chain company, a name called Bi-stairios, is—as part of an overall restructuring, would invest a minimum of $50 million [25] in additional equity capital close quote. That's citing paragraph 28 of the Zapata affidavits submitted by the defendants.

So the controlling shareholders are prepared to invest $50 million, which I—it is fair to infer that this is a group of stockholders with a considerable wealth. And if there is some amount of monies that the company is in dire need of, that is simply a source of capital.

The other portion, when these receivables, and once they are swapped for government notes, government notes are, in effect, pledged to various select creditors, are part of our concern, the first thing it does, violates our contract rights under the fiscal agency agreement which governs our notes. It says that—it says, as to—there is a negative pledge, meaning that the issue of the bonds GMD cannot pledge away, assign away, encumber away its unencumbered assets without also securing the bond debt.

So the concept that in the ordinary course of its business the GMD should be entitled or somehow ought to be able to still utilize some of these notes violates our indisputable contract rights in the fiscal agency agreement, also a document submitted with our affidavit.

That has a very narrow exception for ordinary course, your Honor. And the ordinary course exception to the negative pledge—so-called permitted liens, in other [26] words encumbered, GMD can make in respect of its assets, the ordinary course exception, if you will, and I am reading from page 816 of the fiscal agency agreement, refers to, in connection with social security, workers compensation, employment insurance taxes and similar laws or regulations. In other words, if in the ordinary course of its business, there are some regulatory demands pursuant to which GMD must pledge or encumber assets, there is an exception here.

But as a general rule, I don't think GMD's counsel would dispute this, these kinds of assets cannot just be episodically pledged or encumbered away.

Last point, your Honor, about ordinary course of business. We await the supplemental affidavits, supple-

mental to what Mr. Zapata has told the Court in its sworn testimony in his affidavit, the statements in his affidavit today. But our concern, your Honor, is that, regrettably, the concept of this company operating in an ordinary way, and its ability to continue to operate in an ordinary way, is itself subject to question, quite apart from the fact it has already publicly stated that it is on the verge of insolvency.

What has happened, your Honor, in the discussion this is afternoon, is, we basically learn, in terms of these receivables, and what we thought had been pledged, and what we thought might be left over and encompassed by your [27] Honor's injunction, instead of about 155 million of receivables that had been already pledged or spoken for, some of which unfortunately we believe violated the negative pledge, it looks like 250 million have already been encumbered or spoken for. And there is only 209 totality. And we await this affidavit to explain these curious transactions.

But I think it is fair to say that the affidavit before the Court from Mr. Zapata speaking of 150-some million of receivables in one way or another already pledged, assigned or spoken for, is off by a factor of error of about $100 million.

And, you know, when a very senior member of management submits an affidavit off by $100 million on what is a very important issue, the concept that we should take comfort in them disposing of these assets in an ordinary course of business way, is unfortunately something that is very difficult for us to get comfortable with.

So that kind of exception, which they seem to be requesting to the injunctive order now before your Honor, is one that we, frankly, because of the events of today and prior, have a very difficult time getting comfortable with.

MR. MESCON: Just to clarify a couple of the instances of the differences between the figures we discussed this morning and those we know now.

[28] The largest single assignment was one that occurred in October 1996, more than a year ago, which assignment was not included in the list, it is not at all a recent assignment, it is an old assignment. There is about $40 million of difference between gross assignments and net assignments. That makes up $40 million of that difference. And there is $20 million more in the pot than we thought there was this morning.

So while I agree with counsel that I am sorry that we couldn't have presented a more accurate picture to the Court this morning in the affidavit, something that we will correct on Monday, there is no suggestion of any effort to conceal, obstruct, hide or otherwise obfuscate any of the facts that are present here.

And, indeed, in thinking about the negative pledges, some of the categories that counsel referred to are, some of the principal categories, are the assignments made here a long time ago, publicly, known to plaintiffs, for purposes like taxes, severance benefits that are arguably within the negative pledge.

And I guess one other thought, I believe that there are remedies that if this Court is inclined to issue an injunction, there are remedies that the Court could fashion that are easier for the parties and the Court than the one proposed by plaintiff, that get the bulk of what [29] plaintiff is looking for here without unnecessarily—

THE COURT: —for instance?

MR. MESCON: For instance, and in personon restraint without the creation of a trust to parties that are subject to the jurisdiction of the Court, restraining them, or injoining them from making distributions, with the exception either of ordinary course, or to make it simpler, even a liquidated sum, a sum of, for the sake

of argument, $5 million, and say that defendants may alienate $5 million of these things and not a penny more between now and February 28, for example. Hopefully by that time the whole thing will be over.

It doesn't require the involvement of the Court, it gives most but not all of what they are looking for, it ties up the bulk of what's out there, and it doesn't—it allows the company to operate as it tries to restructure over the next three months.

There is no magic to that number. Carve out a little piece.

THE COURT: What's wrong with that?

MR. CHRISTENSEN: Well, your Honor, one of the things, until we know more what the financial situation is, 5 million may be all that's there.

In fact, if you look at the proposal that's attached as K, they were suggesting to us on December, I [30] believe, 2nd, that if they made all of these other disbursements to other creditors, that there would be 5.5 million available to the U.S. bond holders on a $250 million bond obligation. I'm concerned. That 5 million may be the only asset left ,and I wouldn't want to agree necessarily that it could go out the door at this point. So we are really concerned.

I think that from our perspective the best thing that the Court can do at this point, is to try and solidify the current situation and prevent any further transactions disbursing efforts.

Obviously, if the defendants feel that they are entitled to use these funds for operating purposes, and we strongly disagree with that in terms of the government directives, they can come back to the Court and ask for some relief. We are not going to oppose that, obviously, if it is rational and reasonable. If there is some chance that this entity can survive and prosper, that's very much in our interest. We are in a very difficult situation here financially. So I don't see any objection coming for any reasonable proposal, and I think those kinds of things can be brought up if they need to be brought up.

THE COURT: What is the problem with, rather than creating a trust, which I have a little bit of concern with this Court, or setting up a foreign trust, simply keeping [31] the restraint on the defendants, they cannot dissipate any of this money subject to further order of the Court? That way the defendant, if they have a compelling need, can come back. In the interim, you can be working together and, obviously, you may be agreeable that certain necessary payments have to be made.

MR. CHRISTENSEN: Your Honor, you know, while that's not optimal, obviously, that's still very helpful to us, and we understand that.

We want to be clear here that you are talking about the—and counsel for the defendants has already acknowledged that they interpret the restraint in this way, that they include barring the transfer of receivables that the company holds, and for which the government, in a sense, is paying what we understand to be 100 cents on the dollar for bad receivables, that this bars them from assigning those receivables to other potential creditors. That's the vehicle that they've used to preferred creditors, because the way, at least that I understand the government's directives operate, that these notes are used to pay back those receivables.

And so as long as Mr. Mescon, and he's articulated earlier, he has no problem with that, continues to agree with that, that's, you know, while I said not optimal, it is still very helpful.

[32] MR. MESCON: I'm not 100 percent sure I understand it. The notion is, as our receivables come due we can't spend the cash generated by those? Then we have no money at all to do anything.

THE COURT: I take it what he's saying is you can't assign your receivables to other creditors. Am I correct?

MR. CHRISTENSEN: Yes.

MR. MESCON: But receivables mature, they become cash, and then the cash presumably could be spent. Or—if not, then there is nothing in the company. Because that's how companies get cash, by having receivables get paid.

THE COURT: But that's not in this particular fund.

MR. MESCON: Right.

MR. DARROW: There is—maybe counsel for GMD can clarify this—there is a group of receivables which relate towards, specifically, associated or specifically selected with the construction of toll roads.

It is not difficult to identify that batch of receivables, because we all know what work was involved, work on the toll roads. And it is that species or type of receivable very easily identified that GMD will receive these government issued notes in exchange for. There will be a swap of the so-called toll road receivables for the [33] so-called government notes.

And, in fact, to make it even easier to identify those receivables, GMD's toll road receivables were submitted to Price, Waterhouse last month for review and validation, basically to be sure they were okay, before the government exchange occurs.

What we are saying is that the scope of the injunction would prevent GMD from any disposition of the toll road receivables. A very readily identified type or kind of receivable.

If GMD built a bridge in Buenos Aires last month, and it has an invoice owing from the owner of that bridge for a million dollars, that is not the receivable that we seek to reach, obviously, in this injunction.

MR. MESCON: I guess I come back to suggesting that it is easier, instead of sorting out receivables, to carve out an amount. I think that the Court—

THE COURT: —I don't think it is. I mean, nice try, but my view is that it is appropriate to keep a restraint on these funds in place that, it seems to me, as I understand this receivable issue, the government is paying, since buying these receivables, that those receivables can't then be transferred to somebody else, or that rather than your clients getting the money, it goes to another creditor.

MR. MESCON: Our understanding is that the [34] receivables that are going to be exchanged for the government notes when the government notes are issued, are the very same thing, essentially, as the government notes. And the possession and the right to tender those receivables to the government is the same as having the government note. If that's the question, then—

THE COURT: —what I am going to suggest is the following, it is my view that it is appropriate to enter an injunction, basically preserve this fund and these notes, with the understanding that if that is something you can come back, Mr. Mescon, to seek any modification for, on the showing of some need in order to keep this company alive, on notice to your adversaries. That way we, hopefully, can basically preserve the issue status quo.

And what I am going to suggest you do is that you get together and see if you can't agree on a form of injunction to accomplish that end, since you know better than I all the magic words that should be used in that endeavor. Besides it makes my life easy.

MR. CHRISTENSEN: Your Honor, in that regard, until we have attempted to fashion that language, can the TRO continue?

THE COURT: Correct.

MR. CHRISTENSEN: And Mr. Mescon will notify his client that that continues.

[35] THE COURT: Correct. And I would suggest that you plan to—I suppose I can give you Monday to do that, and come and see me on Tuesday. How's that?

MR. MESCON: Fine.

MR. DARROW: One point of clarification, it is clearly understood, under the scope of the TRO, that it affects the toll road receivables as well as government notes, not the government notes—

THE COURT: I think that is very clear.

MR. MESCON: Yes.

MR. DARROW: I thought so, thank you.

THE COURT: So I am going to continue the TRO until next Tuesday.

MR. DARROW: Thank you, your Honor.

THE COURT: Mrs. Thomas, you are going to give us a time?

THE DEPUTY CLERK: 11:30.

MR. WERTHEIM: Your Honor, we have courtesy copies here of some papers that you got, the memo this morning, but we also filed some supplemental affidavits.

THE COURT: Okay. Tender them to Mrs. Thomas.

What I am simply going to do is endorse, on the copy of the original order to show cause that I have, that the temporary restraining order is continued until December 23.

[36] MR. MESCON: So we are now into the second ten-day period, correct? I want to make sure that we resolve the preliminary injunction issue by year end.

THE COURT: Absolutely.

Mrs. Thomas you can file that. Okay.

Have a pleasant weekend, Sandi.

[Filed Dec. 12, 1997]
[Entered Jan. 2, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARBE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A., DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINO-AMERICANO, S.A. DE C.V.,

Defendants.

ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

Upon consideration of the Summons and Complaint, the Declaration of Michael Kramer, executed on December 11, 1997 and the exhibits thereto, the Declaration of Mario Roberto Martinez Guerrero, executed on December 10, 1997, and the oral application of plaintiffs' counsel, and any defenses thereto:

I.

IT IS HEREBY ORDERED that defendants show cause before this Court, at Room 52, United States Court House, 500 Pearl Street, New York, New York, on December 19, 1997, at 9:30 o'clock in the a.m. thereof, or as soon thereafter as counsel can be heard, why a preliminary injunction should not be issued herein pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, pending the final determination of this action, from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any defendant's right to, interest in, title to or right to receive or retain, any rights, receivables, notes or any other form of consideration, distributed or to be distributed to defendants or defendants' designees pursuant to the toll road rescue plan established by the Mexican Ministry of Communications and Transportation under a decree dated August 27, 1997 (the "Government Notes") and requiring Defendants to deposit the Government Notes into an appropriate trust established under Mexican Law and approved by the Court.

II.

IT IS HEREBY FURTHER ORDERED that, pending the determination of plaintiffs' application for a preliminary injunction, defendants their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, are temporarily restrained and enjoined from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any defendant's right to, interest in, title to or right to receive or retain any of the Government Notes or proceeds thereof.

III.

IT IS HEREBY FURTHER ORDERED that no bond is necessary since the status quo is being maintained pending a determination of plaintiffs' motion for a preliminary injunction.

IV.

IT IS HEREBY FURTHER ORDERED that service of this Order to Show Cause shall be effective when plaintiffs deliver a copy of this Order to Show Cause, together with a copy of the papers in support thereof, upon local counsel for defendants, Messrs. Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, NY 10022, or CT Corporation System, 1633 Broadway, New York, NY, defendants' duly appointed agent for service of process, by hand, Federal Express or other overnight delivery service, on or before, December 13, 1997.

V.

IT IS HEREBY FURTHER ORDERED that, pending further order and for good cause shown, plaintiffs' application to file certain documents containing confidential and nonpublic information relating to defendants is hereby granted, and the Clerk of the Court is hereby directed to accept such documents and maintain them under seal.

VI.

IT IS HEREBY FURTHER ORDERED that answering papers, if any, shall be served by hand upon counsel for plaintiffs, and supplied to the Court, no later than 5 o'clock p.m. on December 18, 1997, and reply papers, if any, shall be similarly served and supplied to the Court no later than December 19, 1997.

Dated: New York, New York
December 12, 1997

Issued: 2:00 p.m.

/s/ John S. Martin, Jr.
United States District Judge

[Filed Apr. 17, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

- against -

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A., DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

JUDGMENT
98,0893

The Court having granted Plaintiffs' (1) motion pursuant to Fed. R. Civ. P. 56(c) for an award of summary judgment on their claim against Defendants for breach of contract, (2) motion pursuant to Fed. R. Civ. P. 12 (b)(6) to dismiss with prejudice Defendants' counterclaims, and (3) motion for an order directing Defendants to irrevocably assign or transfer to Plaintiffs a sufficient amount of toll road Receivables or Government Notes to satisfy this Judgment;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants shall pay Plaintiffs the sum of $82,-323,936 as of April 10, 1998 together with interest accrued to the date of this Judgment at the rate of $17,189 per day for a total sum of $82,444,259;

2. Defendants irrevocably assign or transfer to Plaintiffs within 10 business days hereof a sufficient amount of toll road Receivables or Government Notes to satisfy this Judgment;

3 (a) Pending such assignment or transfer, the restraints as stated in the preliminary injunction order issued on December 23, 1997 is converted into a permanent injunction effective until defendant complies with paragraph 2 above.

* * * *

4. This Court shall retain jurisdiction for the purpose of implementing this Judgment, including, but not limited to, the assignment or transfer of toll road Receivables or Government Notes as ordered herein, and the enforcement of all injunctive relief accorded by the Court in connection with this Judgment.

Dated: New York, New York
April 17, 1998

/s/ Hon. John S. Martin, Jr.
HON. JOHN S. MARTIN, JR.
United States District Judge

This Judgment Was Entered on the Docket on _____.

RULES OF CIVIL PROCEDURE

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits

becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order

without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of

Congress to be heard and determined by a district court of three judges.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

No. 98-231

Supreme Court, U.S.
FILED
SEP 30 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLO URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINO-AMERICANO, S.A. DE C.V.,

Petitioners,

-against-

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 30, 1998

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QUESTION PRESENTED FOR REVIEW

In an action for money damages when the defendant does not contest *in personam* jurisdiction or liability, is admittedly insolvent and in the process of dissipating its principal asset in an attempt to frustrate the plaintiff's anticipated judgment, may a United States district court issue a preliminary injunction prohibiting the defendant from further dissipating its principal asset in order to maintain the status quo and protect the plaintiff's damages remedy?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc. (the "Alliance Funds"), certify that each is a Maryland corporation registered as an investment company under the Investment Company Act of 1940, as amended, whose shares are publicly held. Given their nature, we believe that none of the Alliance Funds has any "parent companies and nonwholly owned subsidiaries" within the meaning of Supreme Court Rule 29.6. Alliance Capital Management, L.P. ("Alliance Capital"), the investment advisor to each of the Alliance Funds, is a Delaware limited partnership whose units are traded on the New York Stock Exchange (the "NYSE"). More than 50% of Alliance Capital's units are owned by wholly-owned direct or indirect subsidiaries of The Equitable Life Assurance Society of the United States ("Equitable"). Equitable is a wholly-owned subsidiary of The Equitable Companies, Incorporated, a holding company, shares of which are traded on the NYSE. The Equitable Companies is controlled by AXA-UAP, a holding company for an international group of insurance and related financial services companies. American Depository Receipts with respect to AXA-UAP also are traded on the NYSE. Various French mutual insurance companies control AXA-UAP.

RULE 29.6 STATEMENT – Continued

Pursuant to Rule 29.6 of the Supreme Court Rules, Credit Suisse First Boston Corporation, as Successor-in-Interest to Respondents Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P., hereby certifies that Credit Suisse First Boston, Inc. ("CSFB, Inc.") is its corporate parent company. CSFB, Inc.'s voting shares are owned 51% by Credit Suisse First Boston, a bank, which, in turn, is wholly-owned by Credit Suisse Group ("CS Group"), and 49% by CS Group. CSFB, Inc's nonvoting shares are 100% owned by Credit Suisse First Boston, the bank. There are no nonwholly owned subsidiaries of Credit Suisse First Boston Corporation.

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INTRODUCTION

Petitioners, Grupo Mexicano de Desarrollo, S.A., *et al.* ("GMD"), seek review of the Second Circuit's opinion affirming the district court's order preliminarily enjoining GMD from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting its rights to its principal asset. *See* App. 1a-21a; 22a-27a.[1] The opinion of the Second Circuit, however, does not warrant this Court's review because (1) this Court has three times before denied certiorari on the same issue and nothing has changed that would warrant a different decision now, (2) there is no genuine conflict among the circuits on the issue, (3) the Second Circuit correctly construed this Court's precedents in affirming the district court's order, and (4) the question presented lacks any broad impact or national importance. Accordingly, GMD's Petition should be denied.

STATEMENT OF THE CASE

GMD is a Mexican holding company that, through its various subsidiaries and joint ventures, is engaged in the construction business. From 1990 to 1994, GMD participated in the Mexican government's program to build a vast intercity toll road network. App. 3a. The program, however, due to economic uncertainty, currency devaluation and other factors, was financially unsuccessful. As a

[1] "App." refers to pages of the Appendix to GMD's Petition for a Writ of Certiorari ("Petition" or "Pet."). No separate appendix accompanies this Brief in Opposition.

result, GMD is owed substantial amounts on unpaid invoices relating to its work in building the toll roads ("Toll Road Receivables"). App. 3a-4a.

In February of 1994, GMD offered and sold to institutional investors $250 million of 8.25% guaranteed notes, due in 2001 ("Bonds"). Respondents, Alliance Bond Fund, Inc., *et al.* ("Respondents"), are eleven institutional investment funds that purchased over $75 million principal amount of the Bonds. App. 3a.

By 1997, GMD was in a precarious financial position. In its Annual Report for the fiscal year ended December 31, 1996, filed with the United States Securities and Exchange Commission on June 30, 1997, GMD admitted that its liabilities exceeded its assets and expressed "substantial doubt" that the company could continue as a going concern. App. 3a-4a. In August 1997, GMD defaulted on the interest payment on the Bonds then due. GMD's insolvency was further confirmed by its October 28, 1997 press release reporting revenues of approximately $119 million, net losses of approximately $802 million through the third quarter of 1997, and a negative net worth of $214 million. App. 4a-5a.

Recognizing the dire financial situation facing the toll road program participants, including GMD, the Mexican government initiated a Toll Road Rescue Program. Under that program, the Mexican government offered to exchange government guaranteed notes ("Government Notes") for the Toll Road Receivables held by companies such as GMD. Although the Government Notes had not been distributed to GMD, in October 1997 GMD publicly

disclosed that it expected to receive $309 million in Government Notes, which were its principal asset. App. 4a. GMD also reported that it had already pledged $117 million in Government Notes to satisfy certain of its Mexican creditors.[2] App. 5a.

As a result of GMD's admitted default, Respondents accelerated the principal on their Bonds and then commenced this action, seeking damages for such default. Due to GMD's pledges of $117 million of the Government Notes, Respondents also sought a temporary restraining order and a preliminary injunction restraining GMD from frustrating any judgment by further pledging or otherwise transferring its interests in the Government Notes. App. 5a. It was not until the hearing on the preliminary injunction was underway that GMD disclosed that it had not been completely candid regarding the amount of Government Notes that it had pledged to its Mexican creditors. It revealed that, instead of $117 million in such pledges, it had in fact pledged between $214 and $258 million to its Mexican creditors. GMD also acknowledged that it planned to make further pledges, leaving only $5.5 million of the original $309 million in Government Notes to satisfy the $75 million plus interest owed to Respondents. App. 5a-6a.

The district court found Respondents' ultimate success on the merits to be almost certain (GMD did not challenge the jurisdiction of the district court over it or its

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[2] GMD accomplished these pledges by either "irrevocably" assigning or placing into "trust" Toll Road Receivables for these creditors with the understanding that the Toll Road Receivables later would be exchanged for Government Notes. App. 5a.

liability on the Bonds)[3] and concluded that, due to GMD's admitted insolvency as well as its attempt to frustrate Respondents' anticipated judgment by assigning the Government Notes exclusively to Mexican creditors, Respondents would be irreparably harmed absent a preliminary injunction. To maintain the status quo and protect Respondents' damages remedy, the district court preliminarily enjoined GMD from dissipating, transferring or otherwise encumbering GMD's right to receive or benefit from the Government Notes. App. 26a.

On appeal, GMD conceded the district court's findings of irreparable injury and likelihood of success on the merits, but challenged its authority to issue the preliminary injunction. Pet. at 4. The Second Circuit unanimously affirmed the district court's order. First, it recognized that Rules 64 and 65 of the Federal Rules of Civil Procedure are not mutually exclusive, as GMD argued below. Thus, the unavailability of relief under

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[3] Respondents have since obtained a Judgment from the district court against GMD in the amount of $82,444,259. App. 58a-59a. This Judgment also converted the preliminary injunction appealed from here into a permanent injunction pending satisfaction of the Judgment. Although GMD has appealed the Judgment to the extent it requires GMD to turn over to Respondents Toll Road Receivables or Government Notes in an amount sufficient to satisfy the Judgment, GMD has not appealed the award of money damages. Moreover, it specifically withdrew its appeal from the portion of the Judgment granting the permanent injunction, effectively conceding the appropriateness of such injunctive relief. The withdrawal of that appeal is inconsistent with GMD's request that this Court review the decision of the Second Circuit affirming the preliminary injunction.

Fed. R. Civ. P. 64 did not preclude the district court, given its personal jurisdiction over GMD, from using its injunctive powers pursuant to Fed. R. Civ. P. 65 to restrain GMD from dissipating its assets regardless of where those assets were located. App. 6a-9a. The Second Circuit then carefully examined the relevant precedents of this Court, the holdings of other courts of appeals and its own decisions to determine whether the district court had authority to issue the preliminary injunction. It concluded that, in the extraordinary situation, as here, when a defendant either is insolvent or is dissipating assets in frustration of a plaintiff's anticipated judgment, Fed. R. Civ. P. 65 authorizes a district court to preliminarily enjoin the defendant to protect the plaintiff's damages remedy. App. 9a-18a. Significantly, with respect to GMD's dissipation of Government Notes in an attempt to frustrate Respondents' judgment, the Court of Appeals stated:

> The plain import of [the district court's] findings is that the actions of GMD were less than benign. . . . This finding was adequately supported. . . . Contrary to [a] legitimate business justification . . . [the district court] clearly believed that GMD was improperly establishing a priority of creditors. . . . GMD's duplicity in disclosing the full extent of its assignments further supports this conclusion.

App. 17a-18a.[4]

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[4] This statement demonstrates the irrelevance of GMD's claim that "[t]here was no suggestion that the assignments in favor of the preferred creditors . . . were on account of anything other than valid debts of GMD." Pet. at 3. As the district court found, and the Second Circuit agreed, GMD, by these transfers,

REASONS THE WRIT SHOULD BE DENIED

As already determined by this Court three times before, the question presented by this appeal does not warrant review. Moreover, the decision of the Second Circuit does not create a genuine conflict with decisions of other circuit courts, and is entirely consistent with the relevant decisions of this Court. Last, the question presented lacks the level of importance necessary to merit review by this Court.

I. THIS COURT HAS THREE TIMES BEFORE DENIED CERTIORARI REVIEW OF THE QUESTION PRESENTED BY THIS APPEAL

On three prior occasions, this Court has considered petitions for review of essentially the same question as that presented by this appeal. In each instance, despite arguments similar to those of GMD, this Court has denied certiorari. *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995); *Ebsco Indus., Inc. v. Lilly*, 840 F.2d 333 (6th Cir.), *cert. denied*, 488 U.S. 825 (1988).[5] Nothing has changed with respect to this question to warrant a different result here.

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was not attempting legitimately to reduce debt and pay off creditors, but to frustrate an anticipated, uncontested judgment in Respondents' favor. App. 17a, 25a-26a.

[5] In *Marcos*, the question presented by petitioner was: "Whether a district court may issue a preliminary injunction freezing the assets of a defendant in a case in which no equitable claim is asserted and no final equitable relief is sought." In *Mitsubishi*, the question presented by petitioner was: "Whether

II. THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS ARE NOT IN CONFLICT

GMD claims that decisions of the Fifth, Tenth and Eleventh Circuits[6] conflict with those of the First, Third, Sixth and Ninth Circuits,[7] which the Second Circuit followed. Pet. at 5. The decisions of the Fifth, Tenth and Eleventh Circuits relied on by GMD, however, are readily distinguishable on key facts from the decisions of the First, Third, Sixth and Ninth Circuits. Moreover, other decisions of the Fifth and Tenth Circuits are consistent with the decisions of the First, Third, Sixth and Ninth Circuits. Therefore, no genuine conflict exists.

In the Fifth and Eleventh Circuit cases relied on by GMD, there is no evidence, unlike here, that the defendants were insolvent, that any judgment would be

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federal district courts have the authority under Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651, to issue preliminary injunctions freezing defendants' assets in order to protect a future money judgment." In *Ebsco*, the question presented by petitioner was: "Whether a federal district court may issue a preliminary injunction, prohibiting a defendant from spending his assets, in order to preserve a pool of funds for the payment of a potential future money judgment."

[6] *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520 (11th Cir. 1994); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1994); *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012 (10th Cir. 1990); *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988).

[7] *See In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990); *Ebsco Indus., Inc. v. Lilly*, 840 F.2d 333 (6th Cir. 1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986).

rendered uncollectible as a result of the defendants' transfers of assets or that the damages remedy otherwise would be inadequate. Indeed, the Fifth and Eleventh Circuits explicitly recognized the absence of such circumstances. *See Rosen*, 21 F.3d at 1527 n.14 ("there is no indication in this case that a legal remedy would not be sufficient"); *Mitsubishi*, 14 F.3d at 1520 (same); *Fredeman*, 843 F.2d at 826 (the only allegation in the record concerning inability to pay money damages was that the defendants were "scoundrels who will try to escape judgment," which, even if true, would not justify a preliminary injunction). Moreover, in *Fredeman*, the Fifth Circuit expressly distinguished cases upholding preliminary injunctions designed, as here, to protect the status quo when a defendant is or is about to become insolvent. *See* 843 F.2d at 828 (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)).

The Tenth Circuit's decision in *Home-Stake Production Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012 (10th Cir. 1990), also is distinguishable; there, the court dismissed the action against the defendants whose assets were sought to be enjoined for lack of personal jurisdiction, not because the court lacked power to issue such an injunction. *See id.* at 1020-21.

Not only are the decisions relied upon by GMD distinguishable, other decisions of the Fifth and Tenth Circuits are consistent with the decisions of the First, Second, Third, Sixth and Ninth Circuits. In *Federal Savings & Loan Insurance Corp. v. Dixon*, 835 F.2d 554 (5th Cir. 1987), the court stated: "We are unwilling to say that *no* circumstances could support an injunction to secure a legal remedy. . . . This court has held, 'The absence of an

available remedy by which the movant can later recover monetary damages, . . . may also be sufficient to show irreparable injury.' " *Id.* at 560 n.1 (emphasis in original) (citations omitted). The Fifth Circuit cited *Dixon* with approval in *Fredeman*. *See* 843 F.2d at 825.

The Tenth Circuit agrees. *See Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (recognizing that difficulty in collecting a damage judgment could support a claim of irreparable injury sufficient to justify a preliminary injunction).[8]

For these reasons, GMD's "well-defined" split among the circuit courts is illusory.

III. THE SECOND CIRCUIT CORRECTLY CONSTRUED THIS COURT'S PRECEDENTS IN AFFIRMING THE DISTRICT COURT'S ORDER

The Second Circuit correctly construed *United States v. First National City Bank*, 379 U.S. 378 (1965), *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945), and *Deckert v. Independence Shares Corp.*, 311 U.S.

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[8] In addition, although not mentioned by GMD, several decisions of other circuits, as well as an earlier decision of the Second Circuit, support the issuance of a preliminary injunction when a defendant is facing insolvency or dissipating its assets in an attempt to avoid a judgment. *See United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987); *Feit & Drexler, Inc. v. Drexler*, 760 F.2d 406 (2d Cir. 1985); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984).

282 (1940), in affirming the district court's order. First, it interpreted *De Beers* as inapplicable to cases in which a party seeks money damages. App. 9a-11a. It held that "[l]imiting *De Beers* to cases where final equitable relief is all that is sought comports with" *Deckert* and *First National*, which "endorse a district court's exercise of general equitable power to ensure the preservation of an adequate remedy" in an action seeking money damages. App. 11a-13a.

De Beers was a government antitrust action in which the only final relief available was a permanent injunction. Unlike here, the defendants did not owe any debt to the plaintiff, and the district court lacked authority to enter a money judgment. Nevertheless, the government sought a preliminary injunction restraining the corporate defendants from transferring assets as security in the event of a fine for contempt for failure to comply with the permanent injunction enjoining future violations of federal law. *See* 325 U.S. at 214-15, 219. The Court held that such preliminary injunctive relief was unavailable because no money damages ultimately were at issue in the suit, and distinguished *De Beers* from cases in which a preliminary injunction prevents the transfer of a fund or property that could be the subject of a final decree. *See id.* at 219-20 (citing *Deckert*).

Such a fund or property existed in *Deckert* and in *First National*. In *Deckert*, an action for damages under the federal securities laws, the Court recognized that preliminary injunctive relief is available to protect a money judgment upon a showing that the defendant is "insolvent and its assets in danger of dissipation or depletion." 311 U.S. at

290. The Court held that such an injunction was a reasonable measure to preserve the status quo pending final determination of the suit when the legal remedy would be inadequate without recourse to those assets. *See id.*

In *First National*, an action by the government for unpaid taxes, the Court again recognized that preliminary injunctive relief is available to protect a money judgment and to preserve the status quo when there is evidence of dissipation of assets.[9] *See id.* at 379, 385 (citing *Deckert*). In so holding, the Court distinguished *De Beers*: "Unlike [*De Beers*], there is here property which would be 'the subject of the provisions of any final decree in the cause.' " *Id.* at 385 (quoting *De Beers*, 325 U.S. at 220).

As in *Deckert* and *First National*, the ultimate relief that Respondents seek here involves the very same assets (Toll Road Receivables or Government Notes) that are the subject of the preliminary injunction. *See First National*, 379 U.S. at 385; *Hoxworth*, 903 F.2d at 195-96 (Becker, J.) (recognizing that legally, as well as economically, money is fungible and, therefore, when a party seeks money damages, a

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[9] Although the government sued to foreclose on a tax lien, the ultimate relief sought was recovery of the funds held by the defendant bank to satisfy the taxes allegedly owed. For this reason, GMD is mistaken when it claims that *First National* is a case in which the government did not sue for money damages. Pet. at 7. GMD also attempts to distinguish *First National* on the ground that the injunction was issued pursuant to the Internal Revenue Code, not Fed. R. Civ. P. 65. Pet. at 7 n.7. GMD is again mistaken because, as the Second Circuit correctly recognized (App. 11a-12a), although such authority existed, the Court relied on the much broader power of personal jurisdiction in upholding the injunction. *See* 379 U.S. at 380, 384 ("Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control").

preliminary injunction which enjoins money or its equivalent necessarily involves a fund or property that could be the subject of the final decree in the action). The Second Circuit, therefore, correctly interpreted the decisions of this Court in affirming the district court's order.

IV. THE COURT OF APPEALS' DECISION LACKS THE BROAD AND RECURRING IMPACT NECESSARY TO WARRANT REVIEW BY THIS COURT

The impact of the Second Circuit's decision is quite limited. Before the type of relief granted in this case can be ordered, the party seeking the preliminary injunction must satisfy the usual Fed. R. Civ. P. 65 requirements: a showing of likely success on the merits and irreparable harm if the injunction is not issued, *i.e.*, harm that cannot be recompensed by money damages. *See* App. 16a. When a money judgment is sought, only extraordinary circumstances will justify a finding of irreparable harm. Courts that have considered the issue have concluded that either a party's pending insolvency or its dissipation of assets in frustration of a money judgment are sufficient to satisfy the irreparable harm requirement. The reservation of this injunctive remedy to such circumstances belies GMD's contention (Pet. at 8) that there will be widespread encroachment by the district courts on the states' powers to determine when and how provisional remedies should be applied. *See* App. 15a; *Marcos*, 25 F.3d at 1480 (restricting such injunctive relief to only extraordinary circumstances where there is insolvency or dissipation of assets avoids the concern expressed in *De Beers* of a "sweeping effect").

Moreover, in this case, provisional state law remedies are not available under Fed. R. Civ. P. 64. The lack of such

relief under Fed. R. Civ. P. 64 further justifies the district court's use of its equitable powers under Fed. R. Civ. P. 65 because, in the absence of injunctive relief, Respondents would be deprived of any remedy. *See* App. 8a (recognizing that a district court is not rendered powerless merely because property lies outside the boundaries of New York State, if it has personal jurisdiction over the defendant, citing among other cases *First National*, 379 U.S. at 384). *See also De Beers*, 325 U.S. at 218 (recognizing that the government disclaimed any reliance on Fed. R. Civ. P. 64, yet not even hinting that this disclaimer could be an appropriate reason to deny a preliminary injunction); *Deckert*, 311 U.S. at 288 (recognizing that the power to make the right of recovery effective implies the power to utilize any of the procedures available according to the exigencies of the particular case). Last, although the preliminary injunction here prevents GMD from dissipating the Government Notes, its purpose is to maintain the status quo and not to seize property to secure satisfaction of Respondents' judgment. Thus, the preliminary injunction is neither a prejudgment attachment nor an end run around Fed. R. Civ. P. 64, as GMD claims. Pet. at 8.

GMD's argument that the decision of the Second Circuit impermissibly expands creditors' rights (Pet. at 8-9) is equally flawed. The preliminary injunction neither grants Respondents any lien on, interest in, or control over any of GMD's assets, nor does it decide any issue of priority among GMD's creditors in Mexico or elsewhere. Moreover, because GMD has not declared bankruptcy or sought any of the protections afforded by a declaration of bankruptcy, the "creditors' rights" touted by GMD simply do not exist – and may never exist. Outside of a bankruptcy proceeding, there is no rule requiring an

equitable proportioning of a given defendant's assets among its creditors. Accordingly, GMD is just like any other defendant which has not declared bankruptcy – subject to the district court's inherent power to effectuate its judgment against a defendant over which it has personal jurisdiction. In any event, this argument was neither briefed by GMD below nor addressed by the Second Circuit. Therefore, it is not properly before this Court and should be disregarded. *See Posters 'n' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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In The Supreme Court of the United States

October Term, 1998

Grupo Mexicano de Desarrollo, S.A., *et al.*,
Petitioners,

v.

Alliance Bond Fund, Inc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 4, 1998
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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages of the printed appendix to the petition for certiorari. They are incorporated herein by reference:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Docket No. 97-CV-9165

ALLIANCE BOND FUND., INC., *et al.*,
Plaintiffs,

v.

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Defendants.

DOCKET ENTRIES

Date	No.	PROCEEDINGS
12/12/97	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $150.00. RECEIPT # 303777. (em) [Entry date 12/15/97]
12/12/97	2	Rule 1.9 certificate filed by Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc. (em) [Entry date 12/15/97]
12/12/97	3	Rule 1.9 certificate filed by Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., The Varde Fund IV-A, L.P. (em) [Entry date 12/15/97]
12/12/97	—	Magistrate Judge Buchwald is so Designated. (em) [Entry date 12/15/97]
12/12/97	4	ORDER TO SHOW CAUSE by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The

Date	No.	PROCEEDINGS
		Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A Show Cause Hearing set for 9:30 12/19/97 for preliminary injunction; for temporary restraining order (signed by Judge John S. Martin); Copies mailed (cd) [Entry date 12/16/97]
12/15/97	6	Affidavit of service of Order to Show Cause, S&C, etc. as to Desarrollo Indust. by Fidel Hawker on 12/12/97; Answer due on 1/1/98 for Desarrollo Indust. (filed in the night deposit on 12/15/97 at 9:34 p.m.) (ae) [Entry date 12/23/97]
12/15/97	6	Affidavit of service of Order to Show Cause, S&C, etc. as to Desarrollo de Infra. by Fidel Hawker on 12/12/97; Answer due on 1/1/98 for Desarrollo de Infra. (filed in the night deposit on 12/15/97 at 9:34 p.m.) (ae) [Entry date 12/23/97]
12/15/97	6	Affidavit of service of Order to Show Cause, S&C, etc. as to Desarrollo Urbano by Fidel Hawker on 12/12/97; Answer due on 1/1/98 for Desarrollo Urbano (filed in the night deposit on 12/15/97 at 9:34 p.m.) (ae) [Entry date 12/23/97]
12/15/97	6	Affidavit of service of Order to Show Cause, S&C, etc. as to Grupo Mexicano de by Fidel Hawker on 12/12/97; Answer due on 1/1/98 for Grupo Mexicano de (filed in the night deposit on 12/15/97 at 9:34 p.m.) (ae) [Entry date 12/23/97] [Edit date 12/23/97]
12/15/97	6	Affidavit of service of Order to Show Cause, S&C, etc. as to Obras Y Proyectos by Fidel Hawker on 12/12/97; Answer due on 1/1/98 for Obras Y Proyectos (filed in the night deposit on 12/15/97 at 9:34 p.m.) (ae) [Entry date 12/23/97]

Date	No.	PROCEEDINGS
12/16/97	5	SEALED DOCUMENT placed in vault (sp)
12/18/97	7	MEMORANDUM of LAW by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. in opposition to [4-1] motion for preliminary injunction (djc) [Entry date 12/23/97]
12/18/97	10	DECLARATION of Michael Kramer in support of plaintiffs' [4-1] motion for preliminary injunction, [4-2] motion for temporary restraining order. (kw) [Entry date 12/29/97]
12/19/97	11	DECLARATION of Jim Monahan in support [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]
12/19/97	12	DECLARATION of Greg Schron in support [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]
12/19/97	13	REPLY MEMORANDUM IN SUPPORT by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A re: [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]
12/19/97	14	DECLARATION of Mark Sandberg in support [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]
12/19/97	15	DECLARATION of Erin L. McManus in support [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]
12/19/97	16	SUPPLEMENTAL DECLARATION of Michael Kramer in support [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]

Date	No.	PROCEEDINGS
12/19/97	17	AFFIDAVIT of Daniel Salcido (ys) [Entry date 12/29/97]
12/22/97	8	Memo endorsed on copy of Order to Show Cause; continuing the TRO to 12/23/97 (signed by Judge John S. Martin); Copies mailed. (cd) [Entry date 12/23/97]
12/22/97	20	REPLY MEMORANDUM IN SUPPORT by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A re: [4-1] motion for preliminary injunction (ys) [Entry date 12/29/97]
12/23/97	9	NOTICE OF APPEAL by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust.; from this Court's Order dated December 23, 1997 granting plaintiffs' motion for a preliminary injunction (the "Order"). Copies of notice of appeal mailed to Attorney(s) of Record: Duncan N. Darrow, Dale C. Christensen Jr.. $105.00 Appeal filing fee paid on December 23, 1997 on receipt # E 304543. (dt) [Edit date 12/23/97]
12/23/97	23	SEALED DOCUMENT placed in vault (af) [Entry date 12/30/97]
12/24/97	18	ORDER, granting [4-1] motion for a preliminary injunction; pending disposition of this action, Defendants, their agents, officers, etc. are Enjoined and Restrained from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any Defendant's right to, interest in, title to or right to receive or retain, any of the Government Notes; nothing contained herein

Date	No.	PROCEEDINGS
		shall prohibit the defendants from commenceing any insolvency proceedings under any applicable law (signed by Judge John S. Martin); Copies mailed (ae) [Entry date 12/29/97]
12/24/97	19	MEMORANDUM OPINION #79827; in connection w/ the Court's order today granting a preliminary injunction against defts, the Court orders that the pltffs post bond of $50,000 (signed by Judge John S. Martin); Copies mailed. (emil) [Entry date 12/29/97]
12/24/97	22	BOND #608147 for $50,000 entered by plaintiffs. (kw) [Entry date 12/30/97]
12/29/97	21	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [9-1] appeal by Desarrollo Indust., Desarrollo Urbano, Obras Y Proyectos, Desarrollo de Infra., Grupo Mexicano de on December 29, 1997. (dt)
12/30/97	24	SEALED DOCUMENT placed in vault (af)
1/7/98	25	STIPULATION and ORDER, reset answer due for 5:30 p.m. on 1/8/98 for Desarrollo Indust., for Desarrollo Urbano, for Obras Y Proyectos, for Desarrollo de Infra., and for Grupo Mexicano de (signed by Judge John S. Martin). (kw) [Entry date 01/08/98]
1/8/98	26	ANSWER to Complaint; jury demand and COUNTERCLAIM by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust.; against Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A; by attorney Richard A. Mescon (ls) [Entry date 01/12/98]

Date	No.	PROCEEDINGS
1/8/98	27	Rule 1.9 certificate filed by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. (ls) [Entry date 01/12/98]
1/27/98	28	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [9-1] appeal by Desarrollo Indust., Desarrollo Urbano, Obras Y Proyectos, Desarrollo de Infra., Grupo Mexicano de on January 27, 1998. (dt)
1/30/98	29	STIPULATION and ORDER, plaintiffs' response to defendants' counterclaims reset for 2/19/98 (signed by Judge John S. Martin). (ae) [Entry date 02/02/98]
2/5/98	30	SEALED DOCUMENT placed in vault (sp)
2/5/98	31	ORDER TO SHOW CAUSE by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, and Desarrollo Indust.; Show Cause Hearing set for 4:00 p.m. on 2/13/98; why an order should not be entered releasing $7,073,000 (U.S.) from the preliminary injunction entered in this action (signed by Judge John S. Martin); Copies mailed. (kw) [Entry date 02/06/98] [Edit date 02/09/98]
2/5/98	32	MEMORANDUM by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, and Desarrollo Indust. in support of [31-1] motion for an order entered releasing $7,073,000 (U.S.) from the preliminary injunction entered in this action. (kw) [Entry date 02/06/98]
2/6/98	33	Transcript of record of proceedings before Judge Martin filed for dates of December 23, 1997 (bm)

Date	No.	PROCEEDINGS
2/6/98	34	Transcript of record of proceedings before Judge Martin filed for dates of December 19, 1997 (bm)
2/6/98	35	CERTIFICATE OF SERVICE of Order To Show Cause, Memorandum in Support of Order To Show Cause and Declaration of Jorge Zapata to counsel for pltffs by personal service on 2/4/98 (sac) [Entry date 02/09/98]
2/12/98	37	MEMORANDUM by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A in opposition to [31-1] motion why an order should not be entered releasing $7,073,000 (U.S.) from the preliminary injunction entered in this action. Received in the night deposit box on 2/12/98 at 12:59 p.m. (sac) [Entry date 02/20/98]
2/13/98	36	Declaration of service of pltffs' Memorandum in Opposition to defts' Application for Relief from the Preliminary Injunction Order as to Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. by fax on 1/12/98. (sac) [Entry date 02/19/98]
2/17/98	38	REPLY MEMORANDUM by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. re: [31-1] motion why an order should not be entered releasing $7,073,000 (U.S.) from the preliminary injunction entered in this action (ys) [Entry date 02/20/98]
2/19/98	45	NOTICE OF MOTION by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos,

Date	No.	PROCEEDINGS
		Desarrollo Urbano, Desarrollo Indust.; to withdraw [31-1] motion why an order should not be entered releasing $7,073,000 (U.S.) from the preliminary injunction entered in this action (ae) [Entry date 02/25/98]
2/20/98	39	Memo endorsed on notice of withdrawal of motion; withdrawing [31-1] motion for an order, releasing $7,073,000 (U.S.) from the preliminary injunction entered in this action (signed by Judge John S. Martin); Copies mailed. (ae) [Entry date 02/24/98]
2/23/98	40	NOTICE OF MOTION by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A for summary judgment, Return date not indicated. Attached Rule 56.1 Statement and Affidavit of Dale C. Christensen, Jr. (ys) [Entry date 02/25/98]
2/23/98	41	MEMORANDUM by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A in support of [40-1] motion for summary judgment (ys) [Entry date 02/25/98]
2/23/98	42	REPLY by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A to [26-2] counter claim; Firm of: Orrick, Herrington & Sutcliffe LLP and Seward & Kissel by attorney

Date	No.	PROCEEDINGS
		Andrew J. Wertheim for counter-defendant The Varde Fund IV-A, Duncan N. Darrow for counter-defendant The Varde Fund IV-A, Dale C. Christensen Jr. for counter-defendant Alliance Global (ys) [Entry date 02/25/98]
2/23/98	43	NOTICE OF MOTION by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A to dismiss counterclaims, Return date not indicated. (ys) [Entry date 02/25/98]
2/23/98	44	MEMORANDUM by Alliance Bond Fund, Alliance World Doll., Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A in support of [43-1] motion to dismiss counterclaims (ys) [Entry date 02/25/98]
3/9/98	46	MEMORANDUM by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. in opposition to pltffs' application for a preliminary injunction (ls) [Entry date 03/12/98]
4/1/98	47	STIPULATION and ORDER, extending time of defts to serve papers in opposition to pltffs' motion for summary judgment is hereby extended to 4/3/98. In addition, GMD agrees to serve the opposition papers on counsel of record for pltffs by hand or telecopy by 5:30 p.m. on 4/3/98; pltffs shall have until 5:30 on 4/24/98 to serve any reply in further support of the motions (signed by Judge John S. Martin). (kg) [Entry date 04/02/98]

Date	No.	PROCEEDINGS
4/6/98	48	RESPONSE by defendants to Re: [43-1] motion to dismiss counterclaims. (kw) [Entry date 04/09/98]
4/15/98	49	REPLY MEMORANDUM by Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A re: in further support of [40-1] motion for summary judgment (sac) [Entry date 04/16/98]
4/15/98	50	SUPPLEMENTAL DECLARATION of Michael Kramer in support by Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A [40-1] motion for summary judgment (sac) [Entry date 04/16/98]
4/17/98	51	JUDGMENT #98,0897; defts shall pay pltffs the sum of $82,323,936 as of 4/10/98 together with interest accrued to the date of this Judgment at the rate of $17,189 per day for a total sum of $82,444,259. (signed by Judge John S. Martin); Mailed copies and notice of right to appeal. (sac) [Entry date 04/20/98]
4/17/98	52	ORDER; granting [40-1] motion for summary judgment; pltffs are awarded jdgmt. in the amt. of $82,444,259.00; granting [43-1] motion to dismiss counterclaims; pltffs' motion for an order directing defts to irrevocably assign or transfer to pltffs a sufficient amt. of toll road Receivables or Govt. Notes to satisfy the jdgmt. is granted; pending such assignment or transfer, the restraints as stated in the preliminary injunction ordered 12/23/97 shall continue and are incorporated herein by reference; the preliminary injunction ordered 12/23/97 is converted to a permanent injunction effective until the deft meets its obligation set forth in paragraph 3; defts' obligation in paragraph 3 is stayed for 10 days; (signed by Judge S. Martin); copies mailed; forwarded orig. doc. to Jdgmt. Clerk on 4/20/98 (ls) [Entry date 04/20/98] [Edit date 04/20/98]

Date	No.	PROCEEDINGS
4/17/98	53	AFFIDAVIT of David L. Feron Re: that attached hereto is a true and accurate transcription of relevant portions of the oral argument that took place before the Second Circuit Court of Appeals on February 20, 1998 in the matter of Alliance Bond Fund, Inc., et al. v. Grupo Mexicano de DeSarrollo, S.A., et al docket no. 97-9610 (djc) [Entry date 04/21/98]
4/17/98	—	Case closed (sac) [Entry date 04/22/98]
4/20/98	54	NOTICE OF APPEAL by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust.; from [52-1] order pltffs' motion for an order directing defts to irrevocably assign or transfer to pltffs a sufficient amt. of toll road Receivables or Govt. Notes to satisfy the jdgmt. is granted, [51-1] judgment order. Copies of notice of appeal mailed to Attorney(s) of Record: Andrew J. Wertheim, Dale C. Christensen Jr., Fees Due. (as) [Entry date 04/21/98]
4/22/98	—	Fee pd. $105.00, rec # 314204 on 4/22/98. (as)
4/27/98	55	True Copy of Order from the USCA as to Grupo Mexicano de RE: It is hereby ordered that the motion be and it hereby is referred to the panel hearing the appeal. (98-7549) George Lange, III, Clerk, USCA. (as) [Entry date 04/29/98]

Date	No.	PROCEEDINGS
5/6/98	56	STIPULATION and ORDER, defendants' time to irrevocably assign or transfer to plaintiffs a sufficient amount of Toll Road Receivables or Government Notes to satisfy the Judgment herein, as provided in this Court's Order and in this Court's Judgment, both dated 4/17/98, is hereby extended from 5/1 to 5/8/98. All other provisions in such Order and Judgment shall remain unchanged and in full force and effect (signed by Judge John S. Martin). (ae) [Entry date 05/07/98]
5/7/98	57	True Copy of Order from the USCA RE: ntiff Alliance Bond Fund moves to dismiss the appeal on the grounds that it is moot. The motion is denied. (98-7549) George Lange, III, Clerk, USCA. (as)
5/7/98	58	True Copy of Order from the USCA as to Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. RE: So much of the district court's order and judgment as requires defts to irrevocably assign or transfer certain notes and receivables to plaintiffs within ten business days is stayed pending appeal. The rest of the order and judgment, including the entry of permanent injunction, is unaffected by this order and remains effective. (97-9610) George Lange, III, Clerk, USCA. (as) [Entry date 05/12/98]
5/28/98	59	MANDATE OF USCA (certified copy) Re: It is now hereby ordered, adjudged and decreed that the judgment be and it hereby is affirmed. (97-9610) George Lange, III, Clerk, USCA. (as)
6/5/98	60	Transcript of record of proceedings before Judge Martin filed for dates of 4/17/98 (bm)

Date	No.	PROCEEDINGS
6/10/98	61	NOTICE OF MOTION by Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A, Alliance Bond Fund, Alliance World Doll., Alliance Global; pursuant to the Inter-American Convention on Letter Rogatory and Section 1781, Title 28, U.S. Code, directing the issuance by this Court of a Letter Rogatory addressed to the appropriate Judicial Authority in the United Mexican States and requesting Judgment rendered by this Court on 4/17/98 in plaintiffs' favor in the amount of $82,444,259 be formally recognized and enforced in accordance with Mexican law; with Affidavit in support attached (ae) [Entry date 06/11/98]
6/10/98	62	MEMORANDUM OF LAW by Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-A, The Varde Fund III-B, The Varde Fund IV-A, Alliance Bond Fund, Alliance World Doll., Alliance Global in support of [61-1] motion pursuant to the Inter-American Convention on Letter Rogatory and Section 1781, Title 28, U.S. Code, directing the issuance by this Court of a Letter Rogatory addressed to the appropriate Judicial Authority in the United Mexican States and requesting Judgment rendered by this Court on 4/17/98 in plaintiffs' favor in the amount of $82,444,259 be formally recognized and enforced in accordance with Mexican law (ae) [Entry date 06/11/98]
6/24/98	63	MEMORANDUM by Grupo Mexicano de, Desarrollo de Infra., Obras Y Proyectos, Desarrollo Urbano, Desarrollo Indust. in opposition to [6_-1] motion pursuant to the Inter-Amer-

Date	No.	PROCEEDINGS
		ican Convention on Letter Rogatory and Section 1781, Title 28, U.S. Code, directing the issuance by this Court of a Letter Rogatory addressed to the appropriate Judicial Authority in the United Mexican States and requesting Judgment rendered by this Court on 4/17/98 in plaintiffs' favor in the amount of $82,444,259 be formally recognized and enforced in accordance with Mexican law (cd) [Entry date 06/25/98]
7/1/98	64	DECLARATION of Jaime R. Cuerra Gonzalez in support of plaintiffs' motion for issuance of a letter Rogatory to a foreign country. (kw) [Entry date 07/06/98]
7/1/98	65	REPLY MEMORANDUM by plaintiffs in further support of plaintiffs' motion for issuance of letter Rogatory to a foreign country. (kw) [Entry date 07/06/98]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 97-9610

ALLIANCE BOND FUND., INC., *et al.*,
Plaintiffs-Appellees,
v.

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Defendants-Appellants.

DOCKET ENTRIES

Date	PROCEEDINGS
1/8/97	Notice of Appeal Acknowledgment Letter from Richard A. Mescon for Appellants Desarrollo Industria, Desarrollo Urbano, Obras Y Proyectos, Desarrollo De, Grupo Mexicano De received. (cv75)
12/24/97	Copy of district court docket entries and notice of appeal on behalf of Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria filed. [97-9610] Form C due on 1/2/98, Form D due on 1/2/98. (cv75)
12/24/97	Copy of district court order, dated December 23, 1997 (cv75)
12/24/97	Copy of receipt re: payment of docketing fee filed on behalf of Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria receipt #: E 304543. [97-9610] (cv75)
12/24/97	Appellants Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria motion to

Date	PROCEEDINGS
	expedite appeal FILED (w/pfs). [1099433-1] Attached ~~Memo~~randum of Law in Support of Motion for an expedited appeal (cv75)
12/29/97	Record on appeal index in lieu of record filed. (cv75)
12/29/97	Order FILED GRANTING motion to expedite appeal [1099433-1] by Appellant Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria, endorsed on motion form dated 12/24/97. (cv75)
12/29/97	Expedited scheduling order filed. Record on appeal is due on 1/8/98. Appellant's brief and appendix due on 1/8/98. Appellee's brief is due on 1/23/98. Appellant's reply brief is due on 1/29/98. Argument as early as the week of 2/19/98. (cv75)
12/31/97	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria Form C filed, with proof of service. [97-9610] Form C deadline satisfied. (cv75)
12/31/97	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria Form D filed, with proof of service. [97-9610] Form D deadline satisfied. (cv75)
12/31/97	Copy of district court order, dated December 12, 1997. (cv75)
1/5/98	Proposed for argument the week of 2/17/98. (ca93)
1/5/98	Notice of Appeal Acknowledgment Letter from Andrew J. Wertheim for Appellees The Varde Fund IV, the Varde Fund III-, The Varde Fund III-, The Varde Fund II-B, The Varde Fund II-A, The Varde Fund, L.P., Avalon Total Return, Elliot Associates, received. (cv75)

Date	PROCEEDINGS
1/7/98	Notice of Appeal Acknowledgment Letter from Richard A. Mescon for Appellant Desarrollo Industria, Appellant Desarrollo Urbano, Appellant Obras Y Proyectos, Appellant Desarrollo De, Appellant Grupo Mexicano De received. (cv76)
1/8/98	Notice of Appeal Acknowledgment Letter from Dale C. Christensen for Appellees Alliance Global, Alliance World Dolla [sic], Alliance Bond Fund received. (cv75)
1/8/98	Appellee Elliot Associates, motion for admission pro hac vice of: Andrew J. Wertheim for purpose of arguing the above-captioned appeal. FILED (w/pfs). [1106590-1] (cv75)
1/8/98	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria brief FILED with proof of service. (cv75)
1/8/98	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria joint appendix filed w/pfs. Number of volumes: one. (cv75)
1/8/98	Notice of Appeal Acknowledgment Letter from Andrew J. Wertheim for Appellees The Varde Fund IV, The Varde Fund III-, The Varde Fund III-, The Varde Fund II-B, The Varde Fund II-A, The Varde Fund, L.P., Avalon Total Return, Elliot Associates, received. (cv75)
1/8/98	Appellee Elliot Associates, Appellee Avalon Total Return, Appellee The Varde Fund, L.P., Appellee The Varde Fund II-A, Appellee The Varde Fund II-B, Appellee The Varde Fund III-, Appellee The Varde Fund III-, Appellee The Varde Fund IV disclosure letter pursuant to FRAP Rule 26.1 RECEIVED. (cc:CAL) (cv72)

Date	PROCEEDINGS
1/8/98	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, and Desarrollo Industria sealed joint appendix filed w/pfs. Number of volumes: one. (cv75)
1/9/98	Copy of district court order, (Order to Show Cause for a Preliminary Injunction and Temporary Restraining Order), dated December 12, 1998. (cv75)
1/16/98	Order FILED GRANTING motion for admission pro hac vice [1106590-1] by Appellee Elliot Associates, endorsed on motion form dated 1/8/98. (cv75)
1/23/98	Appellees Alliance Bond Fund, Alliance World Dolla [sic], Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-, The Varde Fund III-, The Varde Fund IV brief filed with proof of service. (cv75)
1/27/98	Set for argument on 2/18/98. [97-9610] (ca93)
1/27/98	Record on appeal index in lieu of record filed. (cv75)
1/29/98	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria reply brief filed with proof of service. Satisfy appellant's reply brief due. (cv75)
1/30/98	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, and Desarrollo Industria defective Reply Brief filed. Notice sent to party to correct by 2/9/98. The font is proportional. (cv75)
2/4/98	Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, and Desarrollo Industria defective cured. Satisfy defective document response due. (cv75)

Date	PROCEEDINGS
2/12/98	Appellees Alliance Bond Fund, Alliance World Dolla [sic], Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-, The Varde Fund III-, and The Varde Fund IV motion to adjourn oral argument FILED (w/pfs). [1127046-1] (cv75)
2/17/98	Order FILED GRANTING motion to adjourn oral argument [1127046-1] by Appellee Alliance Bond Fund, Alliance World Dolla [sic], Alliance Global, Elliot Associates, Avalon Total Return, The Varde Fund, L.P., The Varde Fund II-A, The Varde Fund II-B, The Varde Fund III-, The Varde Fund III-, The Varde Fund IV, endorsed on motion form dated 2/12/98. (ca93)
2/17/98	Set for argument on 2/20/98. [97-9610] (ca93)
2/20/98	Case heard before MCLAUGHLIN, LEVAL, C.JJ., POLLACK D.J. (TAPE: #157) (ca95)
4/20/98	Attorney Andrew J. Wertheim, Dale C. Christensen affidavit Appellees' Suggestion of Mootness filed with proof of service. (cv75)
4/23/98	Attorney Richard A. Mescon affidavit opposing appellee's suggestion of mootness filed with proof of service. (cv75)
4/23/98	SEALED Document(s): Exhibits A & B FILED. To Defendant-Appellants' Opposition to Plaintiffs-Appellees' Suggestion of Mootness (cv75)
4/23/98	Copy of district court order, (Order to show cause for a preliminary injunction and temporary restraining order) dated December 12, 1997 endorsed by Hon. Martin, USDJ. dated (cv75)
5/1/98	Order filed stating: So much of the District Court's Order and Judgment as requires Defendants to irrevocably assign or transfer certain notes and receivables to Plaintiffs within ten business

Date	PROCEEDINGS
	days is stayed pending appeal. The rest of the Order and Judgment, including the entry of permanent injunction, is unaffected by this Order and remains effective. (JMCL, PNL, C.J., POLLACK, D.J.) (cv70)
5/1/98	Notice to counsel of Order dated 5/1/98. (cv70)
5/1/98	Certified copy of the order, dated 5/1/98 issued to the district court. (cv70)
5/6/98	Judgment of the district court is AFFIRMED by published signed opinion filed. (JMcL) [97-9510] (cv75)
5/6/98	Judgment filed. (cv75)
5/6/98	Notice (Copy of opinion and judgment) to counsel (cv75)
5/12/98	Certified copy of order receipt returned from the district court. (cv75)
5/21/98	Note: The OPINION PRICE is $4.00 (rek)
5/27/98	Judgment MANDATE ISSUED. (cv75)
5/27/98	Notice (Judgment Mandate Issued) to counsel (cv75)
7/27/98	Errata sheet re: page: 3112, line: 13, delete: transferee, insert; transferor filed. (cv75)
8/11/98	Notice of filing petition for writ of certiorari for Appellants Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarrollo Urbano, Desarrollo Industria dated 8/6/98 filed. Supreme Ct. #: 98-231. (cv75)
12/3/98	Letter dated 11/30/98 from the Supreme Court advising of order GRANTING petition for writ of certiorari [1235207-1] by Appellant Grupo Mexicano De, Desarrollo De, Obras Y Proyectos, Desarollo Urbano, Desarrollo Industria, endorsed on motion form dated 8/11/98, filed. (Supreme Court # 98-231) (cv79)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 97CIV.9165

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV, L.P.

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURE, S.A., DE C.V., OBRAS Y PROYECTOS, S.A. DE C.V., DESARROLLOS URBANO INTEGRAL, S.A. DE C.V., and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.

Defendants.

SUMMONS IN A CIVIL ACTION

TO: Authorized Agent for Defendants:

CT Corporation System
1633 Broadway
New York, New York 10019

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon plaintiff's attorney:

For Plaintiffs 4-10:

Andrew J. Wertheim
Duncan N. Darrow
Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York, New York 10103-0001
(212) 506-5000

For Plaintiffs 1-3:

Dale C. Christensen, Jr.
Seward & Kissel
One Battery Park Plaza
New York, New York 10004
(212) 574-1200

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ James M. Parkinson
Clerk

/s/ [Illegible]
By Deputy Clerk

Date

[Return of Service Omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

COMPLAINT

Plaintiffs Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., Alliance Global Dollar Government Fund., Inc., Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P., by and through their respective undersigned attorneys, allege:

1. Plaintiffs are the beneficial owners of approximately $75.8 million of 8¼% Guaranteed Notes Due 2001 issued on February 17, 1994 (the "Notes") by defendant Grupo Mexicano de Desarrollo, S.A. ("GMD" or the "Issuer") and guaranteed by defendants Desarrollo de Infraestructura, S.A. de C.V., Obras y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V. (collectively, the "Guarantors").

2. Plaintiffs bring this action to recover approximately the $80.9 million together with interest currently due and owing to them as a result of defendants' default under the Notes. Plaintiffs also bring this action to preliminarily enjoin and restrain defendants from frustrating any judgment this Court may award plaintiffs. Such an injunction is necessary because, on information and belief, defendants either are insolvent or at risk of insolvency, and are dissipating or are about to dissipate their only substantial liquid asset.

PARTIES

Plaintiffs

3. Each of Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc., is a Maryland corporation with its principal place of business in New York, New York.

4. Elliot Associates, L.P., is a Delaware limited partnership. Elliot Associates, L.P., has two general partners: Mr. Paul Singer, a citizen of New York, and Braxton Associates, L.P., a Delaware limited partnership. Each of the limited partners of Elliot Associates, L.P., is a United States citizen.

5. Avalon Total Return Fund, L.P., is a California limited partnership. Avalon Total Return Fund, L.P., has one general partner, Imperial Asset Management, L.L.C., which is a Delaware limited liability company with its principal place of business in Beverly Hills, California. Each of the limited partners of Avalon Total Return Fund, L.P., is a United States citizen.

6. The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., The Varde Fund IV-A, L.P. (collectively, the "Varde Funds") are each Delaware limited partnerships. The general partners of each of the Varde Funds is Varde Partners, L.P., which is a Delaware limited partnership. Each of the limited partners of the Varde Funds is a United States citizen.

Defendants

7. GMD is a Mexican corporation with its principal place of business at Carretera Mexico-Toluca 4000, Cuajimalpa, D.F. 05000, Mexico. GMD is a holding company that through its various subsidiaries and joint ventures engages in the construction business. Ranked on the basis

of annual revenues, GMD is the third largest construction company in Mexico.

8. Desarrollo de Infraestructura, S.A. de C.V., Obras y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V., are Mexican corporations with their principal places of business at the same address as GMD in Mexico, and are GMD's principal construction subsidiaries.

JURISDICTION

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(2) because the amount in controversy exceeds $75,000 and this action is between citizens of a State and citizens or subjects of a foreign state.

10. Each of the defendants has expressly consented to personal jurisdiction and venue in this district for any legal action, suit or proceeding by the plaintiffs arising out of or based upon the Notes or the guarantee thereof (the "Guarantee").

FACTS

The Notes and Defendants' Default

11. GMD issued the Notes on February 17, 1994 in the principal amount of $250 million. The Notes are a corporate obligation of GMD, the terms and conditions of which are contained in a note instrument, and rank *pari passu* with all other present or future unsecured and unsubordinated debt of GMD.

12. The Notes are not registered under the Securities Act of 1933, and were offered and sold to investors, including plaintiffs, in a so-called "Eurobond offering" pursuant to exceptions from the registration requirements of the federal securities laws.

13. Plaintiffs are institutional investors and, in the aggregate, beneficially own approximately $75.8 million (principal amount) of the Notes.

14. The Notes bear interest at an annual rate of 8¼%, payable semi-annually in arrears in U.S. dollars on February 17 and August 17 of each year.

15. The Issuer defaulted on the August 17, 1997 interest payment of approximately $10.4 million, including about $5.1 million due plaintiffs.

16. The Notes are unconditionally and irrevocably guaranteed as to payment of principal and interest by the Guarantors pursuant to a guarantee instrument.

17. Despite this "unconditional and irrevocable" guarantee, the Guarantors have not paid the interest due on August 17, 1997.

18. On December 11, 1997, each plaintiff duly caused the acceleration of the principal amount of the Notes it beneficially owns.

19. As a result, defendants, jointly and severally, are currently indebted to plaintiffs in the amount of some $80.9 milion, representing some $75.8 million in principal plus about $5.1 million in interest through the date of this Complaint.

20. All conditions precedent, if any, to the maintenance of this action and the granting of the monetary relief requested have occurred, have been waived by defendants or have otherwise been satisfied.

GMD's Precarious Financial Condition

21. In addition to the Notes, as of August 27, 1997, GMD had in excess of $450 million of other creditor claims with the other major creditor constituencies consisting of the following (collectively as the "Mexican Creditors"):

- The Mexican Government for back taxes due by GMD;

- Numerous Mexican bank lenders, most of whom have transferred their defaulted bank debt to a special purpose trust administered under the aegis of the Mexican Central Bank and known by the acronym "Fobaproa;"
- Certain other Mexican financial institutions;
- Trade creditors, most of whom have invoices to GMD substantially in arrears; and
- Terminated employees who are owed severance packages.

22. During the past few years one of the principal activities of GMD (and two other major Mexican construction companies) has been the construction of a vast toll road system throughout Mexico.

23. Much of the Mexican toll road system has not been financially successful. Toll road traffic and revenue is far below originally projected levels. Lenders that financed construction of the toll roads have billions of dollars of debt in default and GMD, along with the other two major Mexican construction companies, have unpaid invoices (the "Receivables") related to their work in building the toll roads. In total, these unpaid Receivables are several hundred million dollars.

24. In an effort to address these systemic problems, the Mexican Government's Secretariat of Communications and Transportation (the "SCT"), by special decree dated August 27, 1997 (the "SCT Decree"), announced a rescue plan for 23 of the country's most financially troubled toll roads (the "Toll Road Restructuring Plan").

25. All of the toll roads encompassed by the Toll Road Restructuring Plan were owned and operated by special purpose entities known as "concessionaires." The dominant stockholder, in the case of most of these concessionaires, was GMD or one of the other two major Mexican construction companies. The principal indebted-

ness of the concessionaires was project finance loans provided, on a road-by-road basis, by virtually every Mexican bank. This concessionaire bank debt represents a multi-billion dollar liability.

26. The cornerstone of the Toll Road Restructuring Plan is the commitment by the Mexican Government to guarantee billions of dollars of rights or notes issued or to be issued by a special purpose trust of the Mexican Government (the "Government Notes"). Most of the Government Notes will be used to pay back the concessionaire bank debt, in full, cancelling that indebtedness. The remainder of the Government Notes are to be paid or distributed to, among others, GMD (or its designees), following an audit of the Receivables that remain unpaid to defendants by the concessionaires. As a result of these measures, the Mexican Government will, in effect, become the new owner and operator of all the toll roads encompassed in the Toll Road Restructuring Plan.

27. According to GMD's press release dated October 28, 1997, reporting its results for third quarter ended September 30, 1997, GMD estimates that it will receive at least $309 million of Government Notes for the GMD Receivables.

28. The Government Note payment to GMD is imminent and could occur as early as December 15, 1997.

29. According to the report of GMD's independent auditor contained in GMD's 1997 Annual Report on Form 20-F, filed on June 30, 1997 with the United States Securities and Exchange Commission, GMD's current liabilities exceeded its current assets as of December 31, 1996 and GMD expressed its opinion that "[t]hese factors, along with the difficulty of obtaining additional financing, create substantial doubt as to whether the Company will be able to continue as a going concern."

30. Reuters, in a story dated August 26, 1997, reported that GMD shareholders' equity was a negative

$167 million after writing off some $629 million in toll road investments.

31. According to GMD's October 28, 1997 press release, for the first nine months of 1997 (based upon Mexican Generally Accepted Accounting Principles), GMD reported revenues of approximately $119 million and a net loss of approximately $802 million. It also reported a $653 million write-off of its toll road asset, and a negative net worth of approximately $214 million.

32. Given GMD's continuing losses from operations, its massive amounts of defaulted debt, its enormous negative net worth, its questionable ability to continue as a going concern, and its inability, as evidence by the default on the Notes, to pays its debts as they come due, GMD is at risk of insolvency, if not insolvent already.

33. In a GMD liquidation scenario, the single most significant liquid asset of GMD would be the Government Notes.

Actions by GMD to Dissipate the Government Notes Asset

34. The Notes are *pari passu* with all other unsecured and unsubordinated GMD debt and the Note instrument prohibits GMD from incurring any secured debt without the Notes also becoming equally and ratably secured, with certain exceptions not relevant here.

35. Despite the fact that the Notes are *pari passu* with the vast majority of GMD's debt, GMD has stated that it plans to use the Government Notes to satisfy its Mexican Creditors to the exclusion of plaintiffs and other beneficial owners of the Notes.

36. Moreover, according to GMD, it already is making formal legal commitments to irrevocably allocate large blocks of the Government Notes to creditor groups other than the beneficial owners of the Notes, *before* the Government Notes have even been issued. For example, according to GMD's October 28, 1997 press release, GMD has

placed various of its Receivables into a form of "irrevocable trust" for other creditors with the intent that those specific Receivables will be exchanged for Government Notes once the Government Notes are issued.

Irreparable Harm to Plaintiffs Unless Defendants' Dissipation of the Government Notes is Enjoined

37. Any distribution of the Government Notes asset to favored Mexican creditors would frustrate any judgment plaintiffs obtain in this action and seek to enforce because GMD is insolvent, or at risk of insolvency.

38. Consequently, plaintiffs would be irreparably harmed and without an adequate remedy at law, unless this Court preliminarily enjoins and restrains defendants from dissipating the Government Notes asset, because GMD's actions in dissipating the Government Notes would make any judgment for breach of contract rendered in plaintiffs' favor uncollectible.

COUNT I
BREACH OF CONTRACT

39. Paragraphs 1 through 38 are realleged and incorporated herein by reference.

40. Defendants have breached their agreements under the Notes and the Guarantee by failing to pay plaintiffs the approximately $75.8 million of principal plus interest currently due and owing.

41. As a direct and proximate result of defendants' breach of the Notes and Guarantee, plaintiffs have suffered damages, including without limitation the approximate $80.9 million currently due and owing under the Notes and Guarantee, plus attorneys' fees.

COUNT II
PRELIMINARY INJUNCTIVE RELIEF

42. Paragraphs 1 through 41 are realleged and incorporated herein by reference.

43. Plaintiffs are likely to succeed on the merits of their claim for breach of contract arising out of defendants' default on the Notes and the Guarantee.

44. Alternatively, plaintiffs have shown sufficient serious questions going to the merits of such claim to make them a fair ground for litigation and the balance of hardships tips decidedly toward plaintiffs.

45. Unless enjoined and restrained from dissipating the Government Notes asset, defendants will frustrate any judgment plaintiffs obtain in this action and thus irreparably harm plaintiffs.

46. Plaintiffs have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

A. Enter an order, pursuant to Federal Rule Civil Procedure 65, preliminarily enjoining and restraining defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, from dissipating, disbursing, transferring, conveying, encumbering or otherwise disposing of or affecting any defendant's right or title to, or other interest in, or right to receive or retain the Government Notes asset pending final determination of this action, and requiring defendants to deposit the Government Notes into an appropriate trust established under Mexican Law and approved by the Court;

B. Enter a final judgment against defendants for all damages, attorneys' fees, interest and costs; and

C. Grant such further and other relief as this Court deems just and proper.

Dated: New York, New York
December 12, 1997

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Andrew J. Wertheim
ANDREW J. WERTHEIM (AW-1554)
DUNCAN N. DARROW
666 Fifth Avenue
New York, New York 10103
(212) 506-5062
Attorneys for Plaintiffs Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P.

-and-

SEWARD & KISSEL

By: /s/ Dale C. Christensen, Jr.
Dale C. Christensen, Jr. (DC-4441)
One Battery Park Plaza
New York, New York 10004
(212) 574-1589
Attorneys for Plaintiffs
Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc. and Alliance Global Dollar Government Fund, Inc.

JUDGE [illegible]

JS 44(CS/SDNY
REV. 3/94

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

PLAINTIFFS	DEFENDANTS
ALLIANCE BOND FUND, INC., et al.	GRUPO MEXICANO de DESARROLLO, S.A., et al
SEE ATTACHED	SEE ATTACHED
ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)	COUNTY OF RESIDENCE
SEE ATTACHED	

97 CIV. 9165

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

BREACH OF CONTRACT

DEC 12 1997

Has this or a similar case been previously filed in SDNY at any time? No ☒ Yes ☐ Judge Previously Assigned _____

If yes, was this case Vol. ☐ Invol. ☐ Dismissed, No ☐ Yes ☐. If yes, give date _____ & Case No. _____

(PLACE AN [x] IN ONE BOX ONLY)

NATURE OF SUIT

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
	PERSONAL INJURY	PERSONAL INJURY			
[ ] 110 INSURANCE	[ ] 310 AIRPLANE	[ ] 362 PERSONAL INJURY-MED MALPRACTICE	[ ] 610 AGRICULTURE	[ ] 422 APPEAL 28 USC 158	[ ] 400 STATE REAPPORTIONMENT
[ ] 120 MARINE	[ ] 315 AIRPLANE PRODUCT LIABILITY	[ ] 365 PERSONAL INJURY PRODUCT LIABILITY	[ ] 620 FOOD & DRUG	[ ] 423 WITHDRAWAL 28 USC 157	[ ] 410 ANTITRUST
[ ] 130 MILLER ACT	[ ] 320 ASSAULT, LIBEL & SLANDER	[ ] 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY	[ ] 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881		[ ] 430 BANKS & BANKING
[ ] 140 NEGOTIABLE INSTRUMENT	[ ] 330 FEDERAL EMPLOYERS' LIABILITY		[ ] 630 LIQUOR LAWS	PROPERTY RIGHTS	[ ] 450 COMMERCE/ICC RATES/ETC.
[ ] 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT	[ ] 340 MARINE	PERSONAL PROPERTY	[ ] 640 R.R. & TRUCK	[ ] 820 COPYRIGHTS	[ ] 460 DEPORTATION
[ ] 151 MEDICARE ACT	[ ] 345 MARINE PRODUCT LIABILITY	[ ] 370 OTHER FRAUD	[ ] 650 AIRLINE REGS	[ ] 830 PATENT	[ ] 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO)
[ ] 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS)	[ ] 350 MOTOR VEHICLE	[ ] 371 TRUTH IN LENDING	[ ] 660 OCCUPATIONAL SAFETY/HEALTH	[ ] 840 TRADEMARK	[ ] 810 SELECTIVE SERVICE
[ ] 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS	[ ] 355 MOTOR VEHICLE PRODUCT LIABILITY	[ ] 380 OTHER PERSONAL PROPERTY DAMAGE	[ ] 690 OTHER	SOCIAL SECURITY	[ ] 850 SECURITIES/ COMMODITIES/ EXCHANGE
[ ] 160 STOCKHOLDERS' SUITS	[ ] 360 OTHER PERSONAL INJURY	[ ] 385 PROPERTY DAMAGE PRODUCT LIABILITY	LABOR	[ ] 861 HIA(1395ff)	[ ] 875 CUSTOMER CHALLENGE 12 USC 3410
[X] 190 OTHER CONTRACT			[ ] 710 FAIR LABOR STANDARDS ACT	[ ] 862 BLACK LUNG(923)	[ ] 891 AGRICULTURE ACTS
[ ] 195 CONTRACT PRODUCT LIABILITY			[ ] 720 LABOR/MGMT. RELATIONS	[ ] 863 DIWC/DIWW(405(g)	[ ] 892 ECONOMIC STABILIZATION ACT
			[ ] 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT	[ ] 864 SSID TITLE XVI	[ ] 893 ENVIRONMENTAL MATTERS
REAL PROPERTY	ACTIONS UNDER STATUTES		[ ] 740 RAILWAY LABOR ACT	[ ] 865 RSI(405(g)	[ ] 894 ENERGY ALLOCATION ACT
[ ] 210 LAND CONDEMNATION	CIVIL RIGHTS	PRISONER PETITIONS	[ ] 790 OTHER LABOR LITIGATION	FEDERAL TAX SUITS	[ ] 895 FREEDOM OF INFORMATION ACT
[ ] 220 FORECLOSURE	[ ] 441 VOTING	[ ] 510 MOTIONS TO VACATE SENTENCE 28 USC 2255	[ ] 791 EMPL. RET. INC. SECURITY ACT	[ ] 870 TAXES	[ ] 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE
[ ] 230 RENT LEASE & EJECTMENT	[ ] 442 EMPLOYMENT	[ ] 530 HABEAS CORPUS		[ ] 871 IRS-THIRD PARTY 26 USC 7609	[ ] 950 CONSTITUTIONALITY OF STATE STATUTES
[ ] 240 TORTS TO LAND	[ ] 443 HOUSING/ ACCOMMODATIONS	[ ] 535 DEATH PENALTY			[ ] 890 OTHER STATUTORY ACTIONS
[ ] 245 TORT PRODUCT LIABILITY	[ ] 444 WELFARE	[ ] 540 MANDAMUS & OTHER			
[ ] 290 ALL OTHER REAL PROPERTY	[ ] 440 OTHER CIVIL RIGHTS	[ ] 550 CIVIL RIGHTS			

Check IF demanded in complaint

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $_____ OTHER_____

Check YES only if demanded in complaint

JURY DEMAND: ☐ YES ☒ NO

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y. IF SO, STATE:

JUDGE_____ DOCKET NUMBER_____

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

BEST AVAILABLE COPY

(PLACE AN x IN ONE BOX ONLY) ORIGIN

☒1 Original Proceeding ☐2 Removed from State Court ☐3 Remanded from Appellate Court ☐4 Reinstated or Reopened ☐5 Transferred From (Specify Dist.) ☐6 Multidistrict Litigation ☐7 Appeal to Dist. Judge from Mag. Judge Judgment

(PLACE AN x IN ONE BOX ONLY) BASIS OF JURISDICTION

☐1 U.S. PLAINTIFF ☐2 U.S. DEFENDANT ☐3 FEDERAL QUESTION (U.S. NOT A PARTY) ☒4 DIVERSITY

28 USC sec. 1332(a)(2)

IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1332, 1441)

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

SEE ATTACHED

	PTF	DEF		PTF	DEF		PTF	DEF
CITIZEN OF THIS STATE	[ ]1	[ ]1	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY	[ ]3	☒3	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE	[ ]5	[ ]5
CITIZEN OF ANOTHER STATE	[ ]2	[ ]2	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE	☒4	[ ]4	FOREIGN NATION	[ ]6	[ ]6

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES) (Calendar Rule 4(A))

SEE ATTACHED

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES) (Calendar Rule 4(A))

SEE ATTACHED

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Check one: THIS ACTION SHOULD BE CLASSIFIED:

☐Expedited ☒Standard ☐Complex ☐Unknown

Check one: THIS ACTION SHOULD BE ASSIGNED TO: ☐WHITE PLAINS ☒FOLEY SQUARE

(DO NOT check either box if this is a PRISONER PETITION.)

DATE December 12, 1997 SIGNATURE OF ATTORNEY OF RECORD

Signed + Emailed by Dale C. Christensen for Pltf 1-3

Signed by Alexandra Willetts for Pltf 4-15

RECEIPT # of Strook, Harrington-Stutcliffe LLP

ADMITTED TO PRACTICE IN THIS DISTRICT

[ ] NO

[X] YES (DATE ADMITTED Mo. 7 Yr. 85)

Attorney Bar Code # AW-1554 DC-4441

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge _____ is so Designated.

James M. Parkison, Clerk of Court by _____ Deputy Clerk, DATED _____.

UNITED STATES DISTRICT COURT (NEW YORK SOUTHERN)

ATTACHMENT TO CIVIL COVER SHEET

ADDITIONAL PLAINTIFFS

2. ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.
3. ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.
4. ELLIOT ASSOCIATES, L.P.
5. AVALON TOTAL RETURN FUND, L.P.
6. THE VARDE FUND, L.P.
7. THE VARDE FUND II-A, L.P.
8. THE VARDE FUND II-B, L.P.
9. THE VARDE FUND III-A, L.P.
10. THE VARDE FUND III-B, L.P.
11. THE VARDE FUND IV-A, L.P.

ADDITIONAL DEFENDANTS

2. DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.
3. OBRAS Y PROYECTOS, S.A. DE C.V.
4. DESARROLLO URBANO INTEGRAL, S.A. DE C.V.
5. DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.

ATTORNEYS FOR PLAINTIFFS

1. For Plaintiffs 4-10
   Andrew J. Wertheim, Esq.
   Duncan N. Darrow, Esq.
   Orrick Herrington & Sutcliffe LLP
   666 Fifth Avenue
   New York, New York 10103-0001
   (212) 506-5062

2. For Plaintiffs 1-3
Dale C. Christensen, Jr., Esq.
Seward & Kissel
One Battery Park Plaza
New York, New York 10004
(212) 574-1589

ATTORNEYS FOR DEFENDANTS

Unknown

CITIZENSHIP OF PRINCIPAL PARTIES

Plaintiffs

Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc. and Alliance Global Dollar Government Fund, Inc., are incorporated in another state and have their principal place of business in this state.

Elliot Associates, L.P., is a citizen of both this state and another state and has its principal place of business in this state.

Avalon Total Return Fund, L.P., is a citizen of and has its principal place of business in the United States.

The Varde Fund, The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P., are each citizens of and have their principal places of business in the United States.

Defendants

Grupo Mexicano de Desarrollo, S.A., Desarrollo de Infraestructura, S.A. de C.V., Obras Y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V., are each Mexican corporations with their principal place of business in Mexico.

PLAINTIFFS' ADDRESSES

ALLIANCE BOND FUND, INC.
ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.
ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.
c/o Alliance Capital Management L.P.
1345 Avenue of the Americas
New York, New York 10105

ELLIOT ASSOCIATES, L.P.
1155 Hillsboro Mile, #507
Hillsboro Beach, Florida 33062

AVALON TOTAL RETURN FUND, L.P.
c/o Imperial Capital, L.P.
150 South Rodeo Drive
Beverly Hills, CA 90212

THE VARDE FUND, L.P.
THE VARDE FUND II-A, L.P.
THE VARDE FUND II-B, L.P.
THE VARDE FUND III-A, L.P.
THE VARDE FUND III-B, L.P.
THE VARDE FUND IV-A, L.P.
c/o Varde Partners, Inc.
3600 West 80th Street
Suite 225
Minneapolis, Minnesota 55435

DEFENDANTS' ADDRESSES

GRUPO MEXICANO DE DESARROLLO, S.A.
DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.
OBRAS Y PROYECTOS, S.A. DE C.V.
DESARROLLO URBANO INTEGRAL, S.A. DE C.V.

DESARROLLO INDUSTRIAL LATINOAMERICANO,
S.A. DE C.V.

Carretera Mexico—Toulca 4000
Cuajimalpa, D.F. 05000
Mexico

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

DECLARATION OF MARIO ROBERTO MARTINEZ GUERRERO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

MARIO ROBERTO MARTINEZ GUERRERO, pursuant to 28 U.S.C. § 1746, declares:

1. I am an attorney admitted to practice in the Mexican legal system and I have been engaged in private practice for approximately 35 years. I am a litigation partner in the law firm of Martinez, Algaba, Estrella, de Haro y Galvan-Duque ("Martinez, Algaba"), which is located in Mexico City. Martinez, Algaba primarily represents corporate clients in financings, other business transactions and litigations. Martinez, Algaba is one of the larger firms in Mexico, with 31 people on its professional staff. Our firm was established 28 years ago.

2. Martinez, Algaba has been retained as special Mexican counsel to a committee composed of various institutional investors (the "Bondholders' Committee" or the "Committee"), all of whom have substantial holdings in the US $250 million (principal amount) 8¼% Guaranteed Notes Due 2001 (the "Notes") issued by Grupo Mexicano de Desarrollo, S.A. ("GMD") and guaranteed by four of GMD's operating subsidiaries: Desarrollo de Infraestructura, S.A. de C.V., Obras y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V. (collectively, the "Guarantors" or "GMD Subs").

3. I understand that several members of the Committee, as plaintiffs, have commenced an action against GMD and the Guarantors as set forth in the complaint that accompanies this declaration. I further understand that the complaint seeks a money judgment based upon the principal and accrued interest due to the plaintiffs with respect to their Note holdings.

4. In addition, I understand that in connection with the filing of the action, plaintiffs will seek injunctive relief from the Court which would, in substance, restrain GMD and the Guarantors from disposition or dissipation of approximately $309 million of notes (the "Government Notes") that are to be received by GMD, the Guarantors, and/or any company or legal entity in which GMD or the Guarantors may have a participation, directly or indirectly, as shareholders, partners or beneficiaries (the "GMD Beneficiaries") and issued by the United Mexican States or any entity controlled by it (the "Mexican Government").

5. I submit this affidavit in support of the plaintiffs' application for injunctive relief and for the specific purpose of summarizing for the Court the Mexican laws that would relate to an attempt by plaintiffs, in the event they successfully prosecuted the instant complaint to a money judgement (the "US Judgment"), to enforce that US Judgment in Mexico and move to attach the assets of GMD to include the Government Notes that GMD, the Guarantors, and/or the GMD Beneficiaries are to receive.

6. As a general proposition, judgments emanating from foreign courts are entitled to recognition by the Mexican courts and can be enforced within the Mexican legal system if such judgments are properly served in Mexico and otherwise comply with the different requirements included in the applicable provisions of law for enforcement of such judgments.

7. On the other hand, a Mexican Court is unlikely to entertain an action by plaintiffs for the provisional relief sought against defendants in this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 10, 1997, at New York, New York.

/s/ Mario Roberto Martinez Guerrero
MARIO ROBERTO MARTINEZ GUERRERO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

AFFIDAVIT OF SERVICE

State of New York, County of New York ss.:

RENEE LEWIS being duly sworn, deposes and says that deponent is not a party to this proceeding, is over 18 years of age and resides at Brooklyn, New York;

That on December 12, 1997 at 5:30 p.m. at 1633 Broadway, New York, New York, deponent served the ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, CIVIL COVER SHEET AND ATTACHMENT, LOCAL RULES OF JUDGE JOHN S. MARTIN, JR., DISCLOSURE OF INTERESTED PARTIES STATEMENT PIURSAUNNT [sic] TO RULE 1.9, DISCLOSURE OF INTERESTED PARTIES, SUMMONS, COMPLAINT, DECLARATION OF MARIO ROBERTO MARTINEZ GUERRERO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, PLAINTIFFS' APPLICATION TO FILE CERTAIN DOCUMENTS UNDER SEAL, CONFIDENTIAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on DESARROLLO DE

INFRAESTRUCTURA S.A. DE C.V. c/o CT CORPORATION SYSTEMS defendant therein named, by delivering a true copy thereof to FIDEL HAWKER, who stated he was authorized to accept said service of process.

The person served was a black male, with brown hair, 25-35 years of age, approximately 160-185 lbs., and was approximately 5'9"-6'0" in height.

/s/ Renee Lewis
RENEE LEWIS
License # 825095

[Notary Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

AFFIDAVIT OF SERVICE

State of New York, County of New York ss.:

RENEE LEWIS being duly sworn, deposes and says that deponent is not a party to this proceeding, is over 18 years of age and resides at Brooklyn, New York;

That on December 12, 1997 at 5:30 p.m. at 1633 Broadway, New York, New York, deponent served the ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, CIVIL COVER SHEET AND ATTACHMENT, LOCAL RULES OF JUDGE JOHN S. MARTIN, JR., DISCLOSURE OF INTERESTED PARTIES STATEMENT PIURSAUNNT [sic] TO RULE 1.9, DISCLOSURE OF INTERESTED PARTIES, SUMMONS, COMPLAINT, DECLARATION OF MARIO ROBERTO MARTINEZ GUERRERO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, PLAINTIFFS' APPLICATION TO FILE CERTAIN DOCUMENTS UNDER SEAL, CONFIDENTIAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on DESARROLLO URBANO INTEGRAL, S.A. DE C.V. c/o CT CORPORA-

TION SYSTEMS defendant therein named, by delivering a true copy thereof to FIDEL HAWKER, who stated he was authorized to accept said service of process.

The person served was a black male, with brown hair, 25-35 years of age, approximately 160-185 lbs., and was approximately 5'9"-6'0" in height.

/s/ Renee Lewis
RENEE LEWIS
License # 825095

[Notary Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

AFFIDAVIT OF SERVICE

State of New York, County of New York ss.:

RENEE LEWIS being duly sworn, deposes and says that deponent is not a party to this proceeding, is over 18 years of age and resides at Brooklyn, New York;

That on December 12, 1997 at 5:30 p.m. at 1633 Broadway, New York, New York, deponent served the ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, CIVIL COVER SHEET AND ATTACHMENT, LOCAL RULES OF JUDGE JOHN S. MARTIN, JR., DISCLOSURE OF INTERESTED PARTIES STATEMENT PIURSAUNNT [sic] TO RULE 1.9, DISCLOSURE OF INTERESTED PARTIES, SUMMONS, COMPLAINT, DECLARATION OF MARIO ROBERTO MARTINEZ GUERRERO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, PLAINTIFFS' APPLICATION TO FILE CERTAIN DOCUMENTS UNDER SEAL, CONFIDENTIAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on GRUPO MEXICANO DE DESARROLLO S.A. c/o CT CORPORATION

SYSTEMS defendant therein named, by delivering a true copy thereof to FIDEL HAWKER, who stated he was authorized to accept said service of process.

The person served was a black male, with brown hair, 25-35 years of age, approximately 160-185 lbs., and was approximately 5'9"-6'0" in height.

/s/ Renee Lewis
RENEE LEWIS
License # 825095

[Notary Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

AFFIDAVIT OF SERVICE

State of New York, County of New York ss.:

RENEE LEWIS being duly sworn, deposes and says that deponent is not a party to this proceeding, is over 18 years of age and resides at Brooklyn, New York;

That on December 12, 1997 at 5:30 p.m. at 1633 Broadway, New York, New York, deponent served the ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, CIVIL COVER SHEET AND ATTACHMENT, LOCAL RULES OF JUDGE JOHN S. MARTIN, JR., DISCLOSURE OF INTERESTED PARTIES STATEMENT PIURSAUNNT [sic] TO RULE 1.9, DISCLOSURE OF INTERESTED PARTIES, SUMMONS, COMPLAINT, DECLARATION OF MARIO ROBERTO MARTINEZ GUERRERO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, PLAINTIFFS' APPLICATION TO FILE CERTAIN DOCUMENTS UNDER SEAL, CONFIDENTIAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on OBRAS Y PROYECTOS, S.A. DE C.V. c/o CT CORPORATION SYSTEMS de-

fendant therein named, by delivering a true copy thereof to FIDEL HAWKER, who stated he was authorized to accept said service of process.

The person served was a black male, with brown hair, 25-35 years of age, approximately 160-185 lbs., and was approximately 5'9"-6'0" in height.

/s/ Renee Lewis
RENEE LEWIS
License # 825095

[Notary Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

AFFIDAVIT OF SERVICE

State of New York, County of New York ss.:

RENEE LEWIS being duly sworn, deposes and says that deponent is not a party to this proceeding, is over 18 years of age and resides at Brooklyn, New York;

That on December 12, 1997 at 5:30 p.m. at 1633 Broadway, New York, New York, deponent served the ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, CIVIL COVER SHEET AND ATTACHMENT, LOCAL RULES OF JUDGE JOHN S. MARTIN, JR., DISCLOSURE OF INTERESTED PARTIES STATEMENT PIURSAUNNT [sic] TO RULE 1.9, DISCLOSURE OF INTERESTED PARTIES, SUMMONS, COMPLAINT, DECLARATION OF MARIO ROBERTO MARTINEZ GUERRERO IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, PLAINTIFFS' APPLICATION TO FILE CERTAIN DOCUMENTS UNDER SEAL, CONFIDENTIAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V. c/o CT

CORPORATION SYSTEMS defendant therein named, by delivering a true copy thereof to FIDEL HAWKER, who stated he was authorized to accept said service of process.

The person served was a black male, with brown hair, 25-35 years of age, approximately 160-185 lbs., and was approximately 5'9"-6'0" in height.

/s/ Renee Lewis
RENEE LEWIS
License # 825095

[Notary Omitted in Printing]

AFFIDAVIT OF SERVICE BY HAND

JOSE MIRANDA, being duly sworn, deposes and says:

I am not a party to the within action, I am over 18 years of age, and reside in Queens County, New York.

On December 12, 1997, I served a copy of the following documents:

1. Order to Show Cause for a Preliminary Injunction and Temporary Restraining Order;
2. Civil cover sheet and attachment;
3. Local Rules of Judge John S. Martin, Jr.;
4. Disclosure of Interested Parties Statement Pursuant to Rule 1.9;
5. Disclosure of Interested Parties;
6. Summons;
7. Complaint;
8. Declaration of Mario Roberto Martinez Guerrero in Support of Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction;
9. Plaintiffs' Application to File Certain Documents Under Seal; and
10. Redacted public file copy of Declaration of Michael Kramer in Support of Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction

by personally delivering a true copy of the above-listed documents to Mark Stukes at the law offices of:

Skadden, Arps, Meagher & Flom
919 Third Avenue
New York, New York

Mr. Stukes is described to wit, a black male approximately 30-35 years of age, and he is about 5 feet 10 inches tall and weigh about 175 pounds.

/s/ Jose Miranda
JOSE MIRANDA

[Notary Omitted in Printing]

AFFIDAVIT OF SERVICE BY HAND

JOSE MIRANDA, being duly sworn, deposes and says:

I am not a party to the within action, I am over 18 years of age, and reside in Queens County, New York.

On December 15, 1997, I served a copy of the following documents:

1. Order to Show Cause for a Preliminary Injunction and Temporary Restraining Order;
2. Civil cover sheet and attachment;
3. Local Rules of Judge John S. Martin, Jr.;
4. Disclosure of Interested Parties Statement Pursuant to Rule 1.9;
5. Disclosure of Interested Parties;
6. Summons;
7. Complaint;
8. Declaration of Mario Roberto Martinez Guerrero in Support of Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction;
9. Plaintiffs' Application to File Certain Documents Under Seal; and
10. Redacted public file copy of Declaration of Michael Kramer in Support of Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction

by personally delivering a true copy of the above-listed documents to Eduardo Vidal, Esq. at the law offices of:

Morgan, Lewis & Bockius LLP
101 Park Avenue
New York, New York 10178-0060

Mr. Vidal is described to wit, a white male approximately 40-45 years of age, and he is about 6″1 inches tall and weigh about 160 pounds.

/s/ Jose Miranda
JOSE MIRANDA

[Notary Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

DECLARATION OF GREG SCHRON IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

GREG SCHRON, pursuant to 28 U.S.C. § 1746, declares:

1. I am an Associate Director at Bear, Stearns & Co. Inc. the registered holder for plaintiff Avalon Total Return Fund, L.P., ("The Avalon Fund").

2. Attached is the original Notice of Acceleration By Registered Holder ("Notice") that I sent on December 11, 1997, by telecopier, to the seven addresses listed thereon. I caused a report of these transmissions to be generated and a copy of that report is attached hereto.

3. I prepared the Notice in the regular course of the business of Bear, Stearns & Co. Inc., in connection with my business duties as the Associate Director, and I have personal knowledge of the facts reported in the Notice. It is the practice of Bear, Stearns & Co. Inc. to prepare such documents when requested to do so by its customers.

4. I prepared this Notice immediately before it was transmitted to the addressees in order to accelerate those 8¼% Guaranteed Notes issued by Grupo Mexicano de Desarrollo, S.A. ("GMD") held by Bear, Stearns & Co. Inc. for the benefit of The Avalon Fund.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 17, 1997 at New York, New York.

/s/ Greg Schron
GREG SCHRON

[Exhibit A to Schron Declaration—Notice of Acceleration at page 1 of Joint Lodging Materials]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

DECLARATION OF JIM MONAHAN IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

JIM MONAHAN, pursuant to 28 U.S.C. § 1746, declares:

1. I am a Vice President, Manager at Merrill Lynch Pierce Fenner & Smith, Inc., the registered holder for plaintiff Elliot Associates, L.P. ("Elliot Associates").

2. Attached is the original Notice of Acceleration By Registered Holder ("Notice") that on the instructions of Elliot Associates I caused to be sent on December 11, 1997, by telecopier, to the seven addressees listed thereon. I caused a report of these transmissions to be generated and a copy of that report is also attached hereto.

3. I completed the Notice in the regular course of Merrill Lynch Pierce Fenner & Smith, Inc.'s business, in connection with my business duties as a Vice President, Manager, and I have personal knowledge of the facts reported in the Notice. It is Merrill Lynch Pierce Fenner & Smith, Inc.'s practice to make such documents when requested to do so by its customers.

4. I filled in the information on the Notice immediately before it was transmitted to the addressees in order to accelerate those 8¼% Guaranteed Notes issued by Grupo Mexicano de Desarrollo, S.A. held by Merrill Lynch Pierce Fenner & Smith, Inc. for the benefit of Elliot Associates.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 17, 1997 at New York, New York.

/s/ Jim Monahan
JIM MONAHAN

[Exhibit A to Monahan Declaration—Notice of Acceleration, with Telecopier Transmissions at page 2 of Joint Lodging Materials]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

DECLARATION OF ERIN L. McMANUS IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

ERIN L. McMANUS, pursuant to 28 U.S.C. § 1746, declares:

1. I am an Account Manager at State Street Bank & Trust Co. ("State Street"), the custodian and registered holder for plaintiff Alliance Bond Fund, Inc. ("Alliance Bond Fund") of $29,200,000.00 in 8¼% Guaranteed Notes issued by Grupo Mexicano de Desarrollo, S.A. ("GMD"). The GMD Notes are held in the Corporate Bond Portfolio of Alliance Bond Fund.

2. Attached is the original Notice of Acceleration By Registered Holder that I sent in the name of the Alliance Corporate Bond Fund, on December 11, 1997, by telecopier, to the seven addressees listed thereon. Also attached are the revised Notices that I sent on December 17, 1997 by telecopier together with reports confirming receipt.

3. I completed the Notices in the regular course of State Street's business, in connection with my business duties as an Account Manager, and I have personal knowledge of the facts reported in the Notices. It is State Street's practice to make such documents when requested to do so by its customers, as the Alliance Bond Fund did in this instance.

4. I filled in the information on these Notices immediately before they were transmitted to the addressees in

order to accelerate those GMD Notes held by State Street for the benefit of Alliance Bond Fund, Inc.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 17, 1997 at North Quincy, Massachusetts.

/s/ Erin L. McManus
ERIN L. McMANUS

[Exhibit A to McManus Declaration—Revised Notice of Acceleration, with Telecopier Transmissions at page 9 of Joint Lodging Materials]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

SUPPLEMENTAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

MICHAEL KRAMER, pursuant to 28 U.S.C. § 1746, declares:

1. I submit this Supplemental Declaration in support of plaintiffs' application for a preliminary injunction to provide the Court with plaintiffs' calculation of the principal and interest due and owing plaintiffs as of December 12, 1997, the date of the filing of the Complaint in this action. Except for those matters stated on information and belief, I have personal knowledge of the facts set forth herein. The sources of my information and bases of my belief are the documents identified below. Capitalized terms have the same meaning as in my Declaration of December 11, 1997.

2. According to the GMD Note (which is attached to my Declaration of December 11, 1997 as Exhibit B), interest is payable semi-annually in arrears on February 17 and August 17 of each year at a rate of 8¼ percent per year. (Page 108) Such interest is calculated on the basis of a 360-day year of twelve 30-day months. (*Id.*) Moreover, as provided therein, interest at the rate of 8¼ percent is also owed on any overdue installment of interest. (*Id.*)

3. Based on plaintiffs' Notices of Acceleration, plaintiffs are the beneficial owners of $75,006,000 principal

amount of the Notes, or thirty percent of the total principal amount ($250,000,000).

4. As set forth on the annexed Attachment, the unpaid and accrued interest due plaintiffs on this amount is $5,188,054, for a total indebtedness of $80,194,054 through the date of the filing of the Complaint.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 1997, at New York, New York.

/s/ Michael Kramer
MICHAEL KRAMER

ATTACHMENT

Plaintiff	Principal Amount Owed
Alliance Funds	$54,100,000
Avalon Fund	1,274,000
Elliott Associates, L.P.	2,850,000
Varde Funds	16,782,000
	$75,006,000

Annual Interest Rate—8.25%		
Daily Interest Owed Plaintiffs Under A 360 Day Year	$ 17,189	
August 17, 1997 Interest Payment Owed Plaintiffs	$3,093,998	
Interest Owed Plaintiffs for August 18, 1997 Through December 12, 1997 (117 Days)	$2,011,098	
Interest (@ 8.25%) Owed Plaintiffs On Overdue Interest ($3,093,998) for August 18, 1997 Through December 12, 1997 (117 Days)	$ 82,958	
Total Interest Owed Plaintiffs		$ 5,188,054
Grand Total Principal Plus Interest		$80,194,054

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

AFFIDAVIT OF DANIEL SALCIDO

State of New York)
) ss.:
County of New York)

DANIEL SALCIDO, being duly sworn, deposes and says:

1. I am a Reorganization Analyst in the Reorganization Department of Goldman, Sachs & Co. ("Goldman Sachs").

2. Goldman Sachs acts as prime broker for The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P. (hereinafter, "The Varde Funds"). In that capacity, Goldman Sachs holds 8¼% Guaranteed Notes due 2001 of Grupo Mexicano de Desarrollo, S.A. ("GMD") for the account of The Varde Funds.

3. On December 11, 1997, at the request of The Varde Funds, I telecopied Notices of Acceleration (copies of which are attached hereto, including the telecopy confirmations) to the seven entities listed at the top of the Notices.

4. Later on December 11, 1997, I was contacted by Mr. Eduardo Vidal of Morgan, Lewis & Bockius who identified himself as counsel to GMD and requested that I send to him the original Notices. That same day, I caused the original Notices to be delivered to Mr. Vidal

and retained copies for our files in the normal course of our business.

/s/ Daniel Salcido
DANIEL SALCIDO

[Notary Omitted in Printing]

[Exhibit A to Salcido Affidavit—Various Notices of Acceleration, with Telecopier Transmission Forms at page 22 of Joint Lodging Materials]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

DECLARATION OF MARK SANDBERG IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION

MARK SANDBERG, pursuant 28 U.S.C. § 1746, declares:

1. I am an Assistant Treasurer at the Bank of New York, the registered holder for plaintiffs Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc.

2. Attached are the original Notices of Acceleration By Registered Holder ("Notices") that on the instructions of the above funds I sent on December 11, 1997, by telecopier, to the seven addressees listed thereon. Although I did not cause a report of these transmissions to be generated, I confirmed verbally with the addresses that each transmission was successfully completed.

3. I completed the Notices in the regular course of the Bank of New York's business, in connection with my business duties as an Assistant Treasurer. It is the Bank of New York's practice to complete such documents when instructed to do so by its customers.

4. I filled in the information on each of these Notices immediately before each was transmitted to the addressees in order to accelerate those 8¼% Guaranteed Notes issued by Grupo Mexicano de Desarrollo, S.A. held by the Bank of New York for the benefit of Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 1997 at New York, New York.

/s/ Mark Sandberg
MARK SANDBERG

[Exhibit A to Sandberg Declaration—Notice of Acceleration at page 40 of Joint Lodging Materials]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

Upon consideration of the Summons and Complaint, the Declaration of Michael Kramer, executed on December 11, 1997 and the exhibits thereto, the Declaration of Mario Roberto Martinez Guerrero, executed on December 10, 1997, and the oral application of plaintiffs' counsel, and any defenses thereto:

I.

IT IS HEREBY ORDERED that defendants show cause before this Court, at Room 152, United States Court House, 500 Pearl Street, New York, New York, on December 19, 1997 at 9:30 o'clock in the a.m. thereof, or as soon thereafter as counsel can be heard, why a preliminary injunction should not be issued herein pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining defendants, their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, pending the final determination of this action, from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any defendant's right to, interest in, title to or right to receive or retain, any rights, receivables, notes or any other form of consideration, distributed or to be distributed to defendants or defendants' designees pursuant to the toll road rescue plan established by the Mexican Ministry of Communications and Transportation under a de-

cree dated August 27, 1997 (the "Government Notes") and requiring Defendants to deposit the Government Notes into an appropriate trust established under Mexican Law and approved by the Court.

II.

IT IS HEREBY FURTHER ORDERED that, pending the determination of plaintiffs' application for a preliminary injunction, defendants their agents, officers, servants, employees, affiliates, attorneys and other representatives, and all persons in active concert or participation with them, are temporarily restrained and enjoined from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or in any way affecting any defendant's right to, interest in, title to or right to receive or retain any of the Government Notes or proceeds thereof.

III.

IT IS HEREBY FURTHER ORDERED that no bond is necessary since the status quo is being maintained pending a determination of plaintiffs' motion for a preliminary injunction.

IV.

IT IS HEREBY FURTHER ORDERED that service of this Order to Show Cause shall be effective when plaintiffs deliver a copy of this Order to Show Cause, together with a copy of the papers in support thereof, upon local counsel for defendants, Messers. Skadden, Arps, Slate, Meagher & Flom, 919 Third Avenue, New York, NY 10022, or CT Corporation System, 1633 Broadway, New York, NY, defendants' duly appointed agent for service of process, by hand, Federal Express or other overnight delivery service, on or before, December 13, 1997.

V.

IT IS HEREBY FURTHER ORDERED that, pending further order and for good cause shown, plaintiffs' application to file certain documents containing confidential and nonpublic information relating to defendants is hereby granted, and the Clerk of the Court is hereby directed to accept such documents and maintain them under seal.

VI.

IT IS HEREBY FURTHER ORDERED that answering papers, if any, shall be served by hand upon counsel for plaintiffs, and supplied to the Court, no later than 5 o'clock p.m. on December 18, 1997, and reply papers, if any, shall be similarly served and supplied to the Court no later than December 19, 1997.

Dated: New York, New York
December 12, 1997

Issued: 2:00 p.m.

/s/ John S. Martin, Jr.
United States District Judge

The temporary restraining order is continued to December 23, 1997.

So Ordered.

/s/ John S. Martin Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

TRANSCRIPT OF PROCEEDINGS

December 23, 1997

11:30 a.m.

Before: HON. JOHN S. MARTIN, JR., District Judge

* * * *

[2] (In open court)

MR. CHRISTENSEN: Your Honor, in the process of drafting, yesterday, we submitted a further draft in light of your Honor's comments to us in the last session in court. And this is a much shorter order. And we would like to submit this.

We were, unfortunately, not able to reach agreement on these two versions.

THE COURT: Okay. All right, let me hear from Mr. Mescon with respect to the differences between the two proposed orders.

MR. MESCON: First, your Honor, there are some differences in the proposed findings of facts.

We believe that the proposed findings of fact contained in the defendant's proposed order, assuming the issuance of an injunction is appropriate in this case, are sufficient to support the injunction, and that the findings sought by the plaintiff go beyond what is sufficient to support an injunction.

THE COURT: But they are supported by the papers underlying the application.

MR. MESCON: A number of the proposed findings are disputed by the defendants. I can point out some examples.

THE COURT: Why don't you do that.

[3] MR. MECCON: For example, on page 5, the statement that in light of defendant's financial condition and dissipation of assets, any judgment plaintiffs obtain in the action will be frustrated.

I believe that finding is not necessary.

There are a number of others. Let me turn to another one.

THE COURT: I believe it is supported by the record before me, and I intend to include that in the order.

I read the order, it seems to me they are all supported by the papers. But I wil hear you.

MR. MESCON: Bottom of page 4. GMD stated that it plans to use the government notes to satisfy its Mexican creditors to the exclusion of other holders of the notes.

You will recall the settlement discussions in which the proposed transfer of notes to the Mexican FDIC was to be done with the consent of the defendants. Those—of the plaintiffs, I'm sorry. Those negotiations obviously broke down.

THE COURT: Let me hear from plaintiffs' counsel with respect to that.

MR. WERTHEIM: Your Honor, Andrew Wertheim for the plaintiffs.

We would point to Exhibit J in the record which quotes the company as saying, quote, once we have cleared [4] our domestic debt, the bondholders will be our only outstanding creditors.

This is the defendant's own words in the record. In the Reuters article of August 27, and we also point to the confidential schedule that has been submitted to the Court, which shows the notes being used, all but for 5.5 million for all creditors other than the noteholders.

MR. MESCON: The proposed settlement was in November. The discussions about making the transfer to Probapro with respect to the discussions with the plaintiffs was in November, the press releases cited by plaintiff were in August.

THE COURT: I will leave that finding in the order.

MR. MESCON: The statement that, on page 3, that the plaintiffs have duly accelerated the maturity of the notes beneficially held by them—that is certainly asserted by the plaintiffs. The defendants do not acquiesce in that finding.

THE COURT: They asserted in affidavits it has no—nothing disputing it before me.

MR. MESCON: Then, your Honor, without our acquiescence in the findings—

THE COURT: —you are not acquiescing.

MR. MESCON: I was prepared to acquiesce in the [5] findings, but I won't now.

So, obviously, your Honor will make the findings that he thinks—that your Honor thinks appropriate.

Let me turn to the decretal paragraphs which are more significant.

The differences first relate to certain provisions in our proposed order that make clear some observations that your Honor had made during the argument. Those observations are that the injunction your Honor's proposing to issue only reaches the toll road receipts and receivables and not other assets of the company. I think that was the context of our discussion.

One could argue that that language is surplusage, but I think it helps clarify the intent of the order.

The second is to make clear that at least this order does not purport to reach assignments of toll road notes that were made prior to the entry of the temporary restraining order. It may be that those issues will be before your Honor at a later time, and your Honor may be asked to address those issues. But at least making it clear that this order does not purport to reach those issues.

And, finally, taken literally, the restriction on assigning the toll road notes might be construed as limiting the ability to assign those or transfer those to a trustee in bankruptcy, or equivalent kind of person. And just to [6] make clear, that it was not the Court's intention in

issuing this restraint to prohibit the defendants from voluntarily initiating the solvency proceedings if appropriate.

THE COURT: Let me hear from plaintiffs' counsel with respect to those.

MR. WERTHEIM: Your Honor, the language that they have proposed in the decretal paragraph, we believe is deficient in a number of respects.

At the top of page 4 of their proposed form of order, they have limited the restraint to the defendant's acting by. And then there is—

THE COURT: —excuse me?

MR. WERTHEIM: I am looking at page 4 of their proposed form of order.

THE COURT: Go ahead.

MR. WERTHEIM: They have limited the restraint to the defendants, which are the parties, to only those people acting by their agents. And the orders listed there. Which is contrary to Rule 65(d) which binds the injunction on all the parties, including defendants.

They have also eliminated the language in 65(d) that it is binding on all persons in active concert or participation with them.

We agree with Mr. Mescon that the provisos are superfluous.

[7] The issue of what this company has done prior to the entry of the TRO in encumbering the receivables or transferring government notes will be before this Court. We contend that it is in breach of the agreement. And we don't believe that there is any need for this proviso, or carve-out, in this order.

It is very clear what this order addresses. We have defined in our proposed order what the receivables are, and they relate only to the toll road notes. Nor do we have any insolvency issue before the Court. And the carve-out for any possible insolvency at a time when there is not an issue before this Court, seems to be also superfluous, and we would argue unnecessary in light—

THE COURT: —what's the harm?

MR. WERTHEIM: The harm, your Honor, is the implication that this Court is trying to say something otherwise that there is something in this order that would effect an insolvency. And we don't want an implication to be on the record.

MR. CHRISTENSEN: Your Honor, if I might be heard on this point, for the Alliance Fund.

Our concern with respect to the language after the last proviso is that the legal effect of the Court's order is ultimately going to be implicated by considerations of Mexican law. And whatever the legal effect of that order [8] is is the effect of it. And we are concerned that the defendants may be trying to articulate in the Mexican court some sort of carve-out that this Court's order does not effect prior transactions, which we find to have been violative of our agreement.

THE COURT: Take that out. I am happy to leave the order to stand.

But what's the problem with saying that nothing in this order prohibits them from commencing insolvency proceedings under any applicable law.

MR. CHRISTENSEN: I don't think it is necessary at all.

My concern is that we don't know what the effect of this Court's order is in terms of the assets in question. And we do not feel that this Court has before it a record to determine whether or not insolvency laws of Mexico permit them to assign these receivables to other creditors.

Whatever their rights are in Mexico, are what their rights are, given what this Court will enter in the normal course in a preliminary injunction.

And we are concerned that this language, which we think is gratuitous, may become a source of greater—well later on, as to what your Honor specifically meant, whether your Honor was giving a blessing to file an insolvency proceeding, and so other forth. And we feel it is [9] unnecessary and has more potential to be misconstrued than accurately construed.

MR. WERTHEIM: Your Honor, your last question is what's wrong with the order carving out that has no affect on commencing such a proceeding.

THE COURT: Correct.

MR. WERTHEIM: That's the last few words—

THE COURT: —yes.

MR. WERTHEIM: —for the plaintiffs that I represent, Elliot and Avalon. We would have no objection to that. And I will let Mr. Christensen speak to the Alliance Funds.

MR. CHRISTENSEN: Our concern, your Honor, is what I stated, we feel that it is superfluous.

We are concerned that there may be some implication that this Court is somehow blessing an insolvency proceeding, even though the words here and the language of the decision don't suggest that.

Whatever the defendant's rights are under Mexican law are what they are. And I don't think this Court should be articulating any provisos or carve-outs on that.

And that's why we are concerned about that, and also concerned about anything declaring that prior transactions are unaffected by this order.

The language is pretty clear, it seems to me, [10] that is directed at the things that are happening at the present. And we see no need for that.

We also feel that to get back to the prior transactions, which we feel were violative of the agreement, to suggest that they were somehow sanctioned, is a mistake.

THE COURT: Well, I see no reason for adding a provision with respect to the prior assignments. But I do think it appropriate to make clear that because it has been, I thought, the position throughout that this action has not in any way prejudiced the right of the defendants to commence insolvency proceedings, if that was the best way to deal with their financial situation.

MR. MESCON: There are two other items your Honor hasn't ruled on yet. One is the proviso with regard to other assets. Your Honor has not addressed that. And the other is the point raised by Mr. Wertheim.

Our language says that the defendants acting by their agents, et cetera, are enjoined.

The reason we suggest that language is because only the defendants are subject to the jurisdiction of this Court. The jurisdiction of this Court does not extend in personam to the agents, officers, servants or the employees of the defendants. So the restraint is on the defendants. Of course, the defendants can only act upon their agents, officers, et cetera. And that's why the language was [11] written that way.

THE COURT: I disagree with you, that simply because they are not presently before the Court they are not bound to respect the orders of this Court. So I am not going to adopt that language.

MR. MESCON: And then as to our proposed language, the open question is the question of whether or not the order will expressly state that it does not relate to other than the toll road receipts. And then we, of course, turn to the language in plaintiffs' proposed order.

THE COURT: Let me hear you again with respect to that.

MR. WERTHEIM: Your Honor, we think that the language we've proposed, where this is a defined term, obviates any need to have any carve-out like that, as it is in defendant's order, where the receivables are—receivables are not a defined term. So it seems again, it is superfluous and unnecessary under our form of proposed order.

MR. CHRISTENSEN: And I would just add, on behalf of the Alliance Funds, that this relates to the very argument that we had before.

I believe this order, as we've proposed it, is well defined, deals with these situations. To add this other language, given the history of these particular [12] defendants, and the amount of funds that have been pledged, may just provide encouragement to construe other revenues or assets to the maximum to include some of these things.

And I think we should leave the language in the order to make clear that we are talking about, as we do, the

toll road receivables in the proceeds of the government notes. That's all your Honor is purporting to do. And I think that should be sufficient.

THE COURT: I agree with that. But I do think I want to make it clear that this does not in any way prejudice their right to commence insolvency proceedings.

All right, now, I take it then, there are two provisions—

MR. MESCON: —right, with regard to the one-week notice requirement for relief from the restraints.

Assuming for the moment, and I don't know the answer to this as I stand here before the Court, whether or not the Court will have jurisdiction to alter the injunction after the appeal is taken.

But assuming for the moment that it does retain jurisdiction to modify the injunction, the Court should not—

THE COURT: You are going to appeal? You don't think I got it right?

MR. MESCON: With due respect, we will ask for a [13] second opinion.

THE COURT: Actually you will be asking for three other opinions, second, third and fourth.

MR. MESCON: The Court should have whatever flexibility it needs to direct, by order to show cause, that any such proceeding be on lesser notice or greater notice, depending upon the exigencies of the circumstances that we cannot predict now.

It may be that one week's notice of an effort to alter the restraint will be too short and there is no emergency. It may be that it has to be done overnight. We don't know. The Court should be able to decide that when it gets the argument.

THE COURT: I agree with you.

MR. MESCON: And on the other hand, there has been no showing here that the defendants have done other than treat the Court's temporary restraining order with the utmost respect, and have complied with it. And to require the certification that is set forth in this paragraph is out of the ordinary, unseemly, is not something—is something

that suggests some lack of confidence by the Court in the willingness of the defendants to comply with the terms of the order. And in the end, adds no protections to the plaintiffs that they don't have from the sanction of contempt.

[14] MR. WERTHEIM: Your Honor, starting with the notice. We would, in implementing the instructions we got from your Honor last week, we were trying to achieve the result that we would be consulted first, prior to any application. And as Mr. Darrow pointed out, there are certainly not against our interests.

THE COURT: At that point we were talking in terms of certain disbursements for regular course activity. But I think Mr. Mescon is right, that we don't know what emergency may come up. Obviously you are going to get reasonable notice. I am not going to sign anything without notice to you.

MR. WERTHEIM: Thank you, your Honor.

On the other point, we have asked for a certificate of compliance as a result of your Honor not going ahead with the request for the applicable Mexican trust, we think that in the absence of having some sort of statement under perjury that would form a basis for further proceedings before this Court should there be any violation given the history of what's gone on here and what's in the record.

THE COURT: What does perjury add to my power under the contempt?

MR. WERTHEIM: It may provide the basis to haul an individual in here that you don't have, given only the [15] corporate defendants.

THE COURT: But we just indicated that the contempt order will apply, does apply to people, agents acting in concert, even though they are not served as defendants in the action.

MR. WERTHEIM: That is correct, your Honor, but this provides an additional.

THE COURT: I simply don't see any need for it.

All right, I simply added at the bottom of page 5 of the plaintiffs' proposed order, "It is further ordered that nothing contained herein shall prohibit these defendants from commencing any insolvency proceedings under any applicable law." And I have deleted the last two ordering paragraphs and have signed the order. And my clerk will make copies for you.

Anything further?

MR. WERTHEIM: Your Honor, is there some provision in the order now about reasonable notice?

THE COURT: There is no provision with respect to notice at all.

MR. MESCON: As a matter of form, I would request that your Honor stay injunction pending appeal.

THE COURT: Application is denied. Thank you.

MR. WERTHEIM: Nothing further.

AMWEST SURETY INSURANCE COMPANY

Bond No. 60 81 47

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

PRELIMINARY INJUNCTION BOND

WHEREAS, by Order of the above entitled Court, Plaintiff is required to file an undertaking in the sum of Fifty Thousand and No'100—($50,000.00) Dollars as a condition for a Preliminary Injunction to be in effect enjoining the above named Defendants from the commission of certain acts as more fully set forth in said Order.

NOW, THEREFORE, Amwest Surety Insurance Company, a corporation organized and existing under the laws of the State of Nebraska and authorized to transact business of surety in the State of New York, having an office and place of business at 115 Broadway, 17th Floor, New York, NY 10006 c/o Elmer S. Hyde, Inc., as Surety, in consideration of the premises and the issuance of said does hereby undertake to pay all costs and disbursements that may be decreed to the Defendants and such damages not exceeding the amount of Fifty Thousand and No'100 —($50,000.00) Dollars as the Defendants may sustain by reason of said Preliminary Injunction, if the same be wrongful and without sufficient cause.

IN WITNESS WHEREOF, we have set our hand and seal this 23rd day of December, 1997.

Amwest Surety Insurance Company

By: /s/ Angela Cordiano
ANGELA CORDIANO
Attorney-in-Fact

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that Defendants Grupo Mexicano de Desarrollo, S.A., Desarrollo de Infraestructura, S.A. de C.V., Obras Y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V., (collectively "GMD") hereby appeal to the United States Court of Appeals for the Second Circuit from this Court's Order dated December 23, 1997 granting plaintiffs' motion for a preliminary injunction (the "Order"). The Order is attached hereto.

Dated: New York, New York
December 23, 1997

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Richard A. Mescon
RICHARD A. MESCON (RM-9023)
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

ANSWER AND COUNTERCLAIMS

JURY TRIAL DEMANDED

Defendants Grupo Mexicano de Desarrollo, S.A. ("GMD"), Desarrollo de Infraestructura, S.A. de C.V., Obras y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V. (collectively the "Guarantors"), for their Answer to the Complaint of plaintiffs, by and through their undersigned attorneys, allege as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Denies the allegations contained in paragraph 2 of the Complaint, except respectfully refers the Court to the Complaint for the allegations contained therein.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint.

7. Admits the allegations contained in paragraph 7 of the Complaint.

8. Admits the allegations contained in paragraph 8 of the Complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint.

10. Admits the allegations contained in paragraph 10 of the Complaint.

11. Denies the allegations contained in paragraph 11 of the Complaint, except admits that GMD issued the Notes and respectfully refers the Court to the Notes for the terms and legal significance thereof.

12. Admits the allegations contained in paragraph 12 of the Complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint.

14. Admits the allegations contained in paragraph 14 of the Complaint.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Complaint, except admits that GMD did not make the August 17, 1997 interest payment.

16. With respect to paragraph 16 of the Complaint, respectfully refers the Court to the guarantee instrument regarding the terms and legal significance thereof.

17. With respect to paragraph 17 of the Complaint, respectfully refers the Court to the guarantee instrument regarding the terms and legal significance thereof, except admits that the interest payable on August 17, 1997 was not paid.

18. With respect to paragraph 18 of the Complaint, denies knowledge or information sufficient to form a belief

as to the truth of the allegations that acceleration was proper, but admits plaintiffs served defendants with purported acceleration documentation.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the Complaint.

20. Denies the allegations contained in paragraph 20 of the Complaint.

21. With respect to paragraph 21 of the Complaint, denies the allegations, but admits that GMD has substantial other creditors some of which are listed in the Complaint.

22. Admits the allegations contained in paragraph 22 of the Complaint.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Complaint, except admits that toll road traffic and revenue is below originally projected levels and that GMD has unpaid invoices relating to its work in building the toll roads.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Complaint, except admits the Mexican Government issued a decree on August 27, 1997, and respectfully refers the Court to the decree for its terms and conditions.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the Complaint, except admits GMD was an equity investor in several concessionaires.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, except admits certain of the Government Notes are expected to be tendered to

GMD in payment of certain outstanding construction receivables.

27. Admits the allegations contained in paragraph 27 of the Complaint.

28. Denies the allegations contained in paragraph 28 of the Complaint.

29. Denies the allegations contained in paragraph 29 of the Complaint, but respectfully refers the Court to the document mentioned therein.

30. Denies the allegations contained in paragraph 30 of the Complaint, but respectfully refers the Court to the document mentioned therein.

31. Admits the alegations contained in paragraph 31 of the Complaint.

32. Denies the allegations contained in paragraph 32 of the Complaint, except admits that GMD is at risk of insolvency.

33. Denies the allegations contained in paragraph 33 of the Complaint.

34. With respect to paragraph 34 of the Complaint, respectfully refers the Court to the Notes for the terms and legal significance thereof.

35. Denies the allegations contained in paragraph 35 of the Complaint.

36. Denies the allegations contained in paragraph 36 of the Complaint, except admits that GMD has made certain irrevocable assignments of certain of the Government Notes, and respectfully refers the Court to the document mentioned therein.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the Complaint.

38. Denies the allegations contained in paragraph 38 of the Complaint.

39. With respect to the allegations contained in paragraph 39 of the Complaint, paragraphs 1 through 38 of this Answer are incorporated herein by reference.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40 of the Complaint.

41. Denies the allegations contained in paragraph 41 of the Complaint.

42. With respect to the allegations contained in paragraph 42 of the Complaint, paragraphs 1 through 41 of this Answer are incorporated herein by reference.

43. Denies the allegations contained in paragraph 43 of the Complaint.

44. Denies the allegations contained in paragraph 44 of the Complaint.

45. Denies the allegations contained in paragraph 45 of the Complaint.

46. Denies the allegations contained in paragraph 46 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

47. Plaintiffs' claims are barred by the doctrine of equitable estoppel.

SECOND AFFIRMATIVE DEFENSE

48. Plaintiffs' claims are barred by the doctrine of unclean hands.

THIRD AFFIRMATIVE DEFENSE AND FIRST COUNTERCLAIM

49. The Court has jurisdiction over this counterclaim by virtue of 28 U.S.C. § 1332(a)(2) because the amount in controversy exceeds $75,000 and this action is between citizens of a State and citizens or subjects of a foreign

state, and alternatively by virtue of 28 U.S.C. § 1367(a) because the claim is so related to the claims in plaintiffs' Complaint that they form part of the same case or controversy under Article III of the United States Constitution.

50. The Court has personal jurisdiction over each of the plaintiffs and venue is proper in this district.

51. One of defendants' principal creditors is FOBAPROA ("Fondo Bancario de Protección al Ahorro," or "Bank Savings Support Fund"), a fund established under the auspices of Banco de Mexico (Mexico's Central Bank) for the purpose of supporting banking institutions in financial difficulty via, among other vehicles, direct loans or the purchase of loans at above-market rates.

52. Certain of defendants' Mexican bank creditors assigned loans they had made to GMD and its subsidiaries to FOBAPROA as part of the recapitalization of such banks.

53. GMD has begun efforts to renegotiate bank debt of GMD and its subsidiaries of approximately $256 million with FOBAPROA.

54. In return for good and valuable consideration, plaintiffs, by and through their agents, orally and in writing, agreed not to interfere with GMD's negotiations with FOBAPROA or otherwise discuss GMD and its subsidiaries with FOBAPROA.

55. Upon information and belief, plaintiffs breached this agreement on various occasions by engaging in discussions with FOBAPROA regarding GMD and its subsidiaries to the detriment of defendants.

56. Plaintiffs thereby also breached their obligation of good faith and fair dealing owed to defendants.

57. Defendants have been damaged by plaintiffs' breach of the agreement not to interfere with or otherwise discuss GMD and its subsidiaries with FOBAPROA, and by

plaintiffs' breach of their obligation of good faith and fair dealing owed to defendants.

FOURTH AFFIRMATIVE DEFENSE AND SECOND COUNTERCLAIM

58. Defendants repeat the allegations in paragraphs 49 through 57.

59. An agreement in principle was reached with FOBAPROA, that GMD and its subsidiaries would pay the amounts due at a substantial discount of approximately 60%.

60. Upon information and belief, plaintiffs had notice and knowledge of the agreement between GMD and FOBAPROA.

61. Even though plaintiffs had notice and knowledge of the agreement, upon information and belief, plaintiffs, by and through their agents, wrongfully, knowingly, intentionally, maliciously and without reasonable justification or excuse, caused FOBAPROA to back out of the agreement and to refuse to proceed further.

62. Upon information and belief, a final agreement would have resulted between FOBAPROA and defendants but for the interference of plaintiffs.

63. By reason of plaintiffs' interference, defendants have been unable to reach agreement with FOBAPROA and defendants have been deprived of the substantial discount they would have received from FOBAPROA, so that defendants have been injured in the amount of at least $153 million.

FIFTH AFFIRMATIVE DEFENSE AND THIRD COUNTERCLAIM

64. Defendants repeat the allegations in paragraphs 49 through 63.

65. By virtue of their interference in the restructuring of defendants' financial operations, upon information and belief, plaintiffs have intentionally inflicted harm upon defendants without excuse or justification, resulting in special damages to defendants.

SIXTH AFFIRMATIVE DEFENSE AND FOURTH COUNTERCLAIM

66. Defendants repeat the allegations in paragraphs 49 through 65.

67. GMD has irrevocably assigned certain amounts of the Government Notes to creditors, including but not limited to an assignment to the Mexican Government for back taxes and an assignment to an employee severance trust.

68. Upon information and belief, plaintiffs had notice and knowledge of GMD's right to receive certain amounts of the Government Notes, and of GMD's assignments of at least $117 million of such notes.

69. Even though plaintiffs had notice and knowledge of GMD's right to receive certain amounts of the Government Notes, and of GMD's assignment of at least $117 million of su h notes, upon information and belief, the plaintiffs, by and through their agents, wrongfully, knowingly, intentionally, maliciously and without reasonable justification or excuse, attempted to persuade the Mexican Government to defer the partial or complete payment of the Government Notes to GMD and its subsidiaries.

70. Upon information and belief, the plaintiffs' interference has caused the Mexican Government to delay the payment of the Government Notes to GMD.

71. By reason of the plaintiffs' interference, defendants have been deprived of the substantial benefits they would have received as a result of the assignments, and have been injured in the amount of at least $117 million.

WHEREFORE, defendants respectfully requests judgment in its favor and against plaintiffs, jointly and severally, in the amount of at least $153 million, with interest and costs, punitive damages, attorney's fees and such other relief as the Court deems just and proper.

JURY DEMAND

72. Defendants hereby demand a jury for resolution of the issues raised by plaintiffs' Complaint as well as the issues raised herein by defendants' Answer, Affirmative Defenses and Countercaims.

Dated: New York, New York
January 8, 1998

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Richard A. Mescon
RICHARD A. MESCON (RM-9023)
GERALD M. FREEDMAN (GF-5705)
101 Park Avenue
New York, New York 10178
(212) 309-6000
Attorneys for Defendants
Grupo Mexicano de Desarrollo, S.A., Desarrollo de Infraestructura, S.A. de C.V., Obras y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V.

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

REPLY TO COUNTERCLAIMS AND DEFENSES

Plaintiffs Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., Alliance Global Dollar Government Fund, Inc., Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-A, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P. (collectively, "Plaintiffs") by their respective attorneys Seward & Kissel and Orrick, Herrington & Sutcliffe LLP, for their reply to the counterclaims of defendants Grupo Mexicano de Desarrollo, S.A. ("GMD"), Desarrollo de Infraestructura, S.A. de C.V., Obras y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. (collectively, "Defendants"):

1. Deny the averments of paragraph 49, except state that Defendants purport to invoke the jurisdiction of this Court over their counterclaims by virtue of 28 U.S.C. § 1332(a)(2) and, alternatively, by virtue of 28 U.S.C. § 1367(a).

2. Admit the averments of paragraph 50.

3. Deny the averments of paragraphs 51, 52 and 53, except state that, on information and belief, certain Mexican bank lenders of Defendants have transferred Defendants' defaulted bank debt to Fobaproa, a special purpose trust administered under the aegis of the Mexican Central Bank and that Defendants, on information and belief,

have engaged in discussions with Fobaproa to renegotiate their defaulted bank debt held by Fobaproa.

4. Deny the averments of paragraphs 54, 55, 56 and 57.

5. Deny the averments of paragraph 59, except state that Defendants informed Plaintiffs of a proposed settlement between GMD and Fobaproa to repay the defaulted bank debt held by Fobaproa at a discount.

6. Deny the averments of paragraphs 60, 61, 62, 63 and 65.

7. Deny the averments of paragraphs 67, 68, 69, 70 and 71, except state that GMD reported in its press release of October 28, 1997, that Defendants expected to receive a certain amount of Government Notes under the Toll Road Restructuring Plan, that Defendants purportedly had established a trust to which they had assigned the right to receive $17 million of Government Notes to pay employee severance packages, and that Defendants purportedly had assigned $100 million in Government Notes to the Mexican Treasury for payment of past tax liabilities.

8. Plaintiffs reallege and incorporate by reference in each and every defense asserted herein Paragraphs 1 through 41 of the Complaint.

FIRST DEFENSE

9. Each of the counterclaims fail to state a claim upon which relief can be granted.

SECOND DEFENSE

10. Each of the counterclaims is barred by the doctrine of laches.

THIRD DEFENSE

11. Each of the counterclaims is barred by the doctrine of unclean hands.

FOURTH DEFENSE

12. Each of the counterclaims is barred by principles of equitable and promissory estoppel.

FIFTH DEFENSE

11. Plaintiffs reallege and incorporate by reference paragraphs 1 through 12 herein.

14. On information and belief, Plaintiffs did not interfere with GMD's negotiations with Fobaproa.

15. By reason thereof, the First Counterclaim should be dismissed.

SIXTH DEFENSE

16. Plaintiffs reallege and incorporate by reference paragraphs 1 through 15 herein.

17. Defendants have not and could not have been damaged as a result of any alleged interference by Plaintiffs with GMD's negotiations with Fobaproa because, as Defendants admit, any proposed settlement agreement between GMD and Fobaproa was subject to Plaintiffs' express approval.

18. By reason thereof, the First Counterclaim should be dismissed.

SEVENTH DEFENSE

19. Plaintiffs reallege and incorporate by reference paragraphs 1 through 18 herein.

20. Plaintiffs have fulfilled any obligation of good faith and fair dealing owed Defendants.

21. By reason thereof, the First Counterclaim should be dismissed.

EIGHTH DEFENSE

22. Plaintiffs reallege and incorporate by reference paragraphs 1 through 21 herein.

23. On information and belief, defendants never entered into a binding settlement agreement with Fobaproa.

24. By reason thereof, the Second Counterclaim should be dismissed.

NINTH DEFENSE

25. Plaintiffs reallege and incorporate by reference paragraphs 1 through 24 herein.

26. Even assuming, arguendo, that defendants had entered into a binding settlement agreement with Fobaproa, plaintiffs had no knowledge of any such agreement.

27. By reason thereof, the Second Counterclaim should be dismissed.

TENTH DEFENSE

28. Plaintiffs reallege and incorporate by reference paragraphs 1 through 27 herein.

29. Any action taken by Plaintiffs with respect to any alleged agreement in principle between GMD and Fobaproa was privileged and justified by Plaintiffs' need to protect their economic interests in the Notes under which Defendants are indebted to Plaintiffs for some $80.2 million plus accruing interest.

30. By reason thereof, the Second Counterclaim should be dismissed.

ELEVENTH DEFENSE

31. Plaintiffs reallege and incorporate by reference paragraphs 1 through 30 herein.

32. Any action taken by Plaintiffs with respect to any alleged agreement in principle between GMD and Fobaproa was motivated by Plaintiffs' economic interests in the Notes under which Defendants are indebted to Plaintiffs for some $80.2 million plus accruing interest, rather than by any malicious intent on the part of Plaintiffs or desire to inflict injury.

33. By reason thereof, the Second Counterclaim should be dismissed.

TWELFTH DEFENSE

34. Plaintiffs reallege and incorporate by reference paragraphs 1 through 33 herein.

35. Any action taken by Plaintiffs with respect to any alleged agreement in principle between GMD and Fobaproa was not fraudulent or criminal, or otherwise wrongful or improper.

36. By reason thereof, the Second Counterclaim should be dismissed.

THIRTEENTH DEFENSE

37. Plaintiffs reallege and incorporate by reference paragraphs 1 through 36 herein.

38. Defendants have not been damaged as a result of any alleged interference by Plaintiffs with any alleged agreement in principle between GMD and Fobaproa because, as defendants admit, any proposed settlement agreement between GMD and Fobaproa was subject to Plaintiffs' express approval.

39. By reason thereof, the Second Counterclaim should be dismissed.

FOURTEENTH DEFENSE

40. Plaintiffs reallege and incorporate by reference paragraphs 1 through 39 herein.

41. Any action taken by Plaintiffs with respect to the restructuring of Defendants' financial operations was privileged and justified by Plaintiffs' need to protect their economic interests in the Notes under which Defendants are indebted to Plaintiffs for some $80.2 million plus accruing interest.

42. By reason thereof, the Third Counterclaim should be dismissed.

FIFTEENTH DEFENSE

43. Plaintiffs reallege and incorporate by reference paragraphs 1 through 42 herein.

44. Any action taken by Plaintiffs with respect to the restructuring of Defendants' financial operations was motivated by Plaintiffs' economic interests in the Notes under which Defendants are indebted to Plaintiffs for some $80.2 million plus accruing interest, rather than by any malicious intent on the part of Plaintiffs or desire to inflict injury.

45. By reason thereof, the Third Counterclaim should be dismissed.

SIXTEENTH DEFENSE

46. Plaintiffs reallege and incorporate by reference paragraphs 1 through 45 herein.

47. Any action taken by Plaintiffs with respect to the restructuring of Defendants' financial operations was not fraudulent or criminal, or otherwise wrongful or improper.

48. By reason thereof, the Third Counterclaim should be dismissed.

SEVENTEENTH DEFENSE

49. Plaintiffs reallege and incorporate by reference paragraphs 1 through 48 herein.

50. On information and belief, any action taken by Plaintiffs with respect to the restructuring of Defendants' financial operations has not resulted in special damages to Defendants.

51. By reason thereof, the Third Counterclaim should be dismissed.

EIGHTEENTH DEFENSE

52. Plaintiffs reallege and incorporate by reference paragraphs 1 through 51 herein.

53. The Third Counterclaim sounding in prima facie tort is redundant of the Second and Fourth Counterclaims.

54. By reason thereof, the Third Counterclaim should be dismissed.

NINETEENTH DEFENSE

55. Plaintiffs reallege and incorporate by reference paragraphs 1 through 54 herein.

56. On information and belief, Defendants have not entered into a binding agreement with the Mexican Government to receive the Government Notes.

57. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTIETH DEFENSE

58. Plaintiffs reallege and incorporate by reference paragraphs 1 through 57 herein.

59. On information and belief, Defendants have not entered into binding agreements to assign certain amounts of Government Notes to creditors.

60. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-FIRST DEFENSE

61. Plaintiffs reallege and incorporate by reference paragraphs 1 through 60 herein.

62. Any action taken by Plaintiffs with respect to the Mexican Government was privileged and justified by Plaintiffs' need to protect their economic interests in the Notes under which Defendants are indebted to Plaintiffs for some $80.2 million plus accruing interest.

63. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-SECOND DEFENSE

64. Plaintiffs reallege and incorporate by reference paragraphs 1 through 63 herein.

65. Any action taken by Plaintiffs with respect to the Mexican Government was motivated by Plaintiffs' economic interests in the Notes under which Defendants are indebted to Plaintiffs for some $80.2 million plus accruing interest, rather than by any malicious intent on the part of Plaintiffs or desire to inflict injury.

66. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-THIRD DEFENSE

67. Plaintiffs reallege and incorporate by reference paragraphs 1 through 66 herein.

68. Any action taken by Plaintiffs with respect to the Mexican Government was not fradulent or criminal, or otherwise wrongful or improper.

69. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-FOURTH DEFENSE

70. Plaintiffs reallege and incorporate by reference paragraphs 1 through 69 herein.

71. On information and belief, any action taken by Plaintiffs with respect to the Mexican Government did not cause the Mexican Government to delay payment of the Government Notes to GMD.

72. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-FIFTH DEFENSE

73. Plaintiffs reallege and incorporate by reference paragraphs 1 through 72 herein.

74. On information and belief, any action taken by Plaintiffs with respect to the Mexican Government has not resulted in damages to Defendants.

75. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-SIXTH DEFENSE

76. Plaintiffs reallege and incorporate by reference paragraphs 1 through 75 herein.

77. On information and belief, any action taken by Plaintiffs with respect to the Mexican Government did not cause the breach of any purported assignments of the Government Notes.

78. By reason thereof, the Fourth Counterclaim should be dismissed.

TWENTY-SEVENTH DEFENSE

79. Plaintiffs reallege and incorporate by reference paragraphs 1 through 78 herein.

80. On information and belief, any action taken by Plaintiffs with respect to the Mexican Government has not deprived Defendants of any benefits they allegedly would have received as a result of the purported assignments of Government Notes to creditors.

81. By reason thereof, the Fourth Counterclaim should be dismissed.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment (a) dismissing the Counterclaims with prejudice, (b) awarding Plaintiffs reasonable attorneys' fees and disbursements incurred in defending the counterclaims, and (c) granting such other and further relief as may seem just and proper.

New York, New York
February 19, 1998

ORRICK, HERRINGTON & SUTCLIFFE LLP

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-and-

SEWARD & KISSEL

By: /s/ Dale C. Christensen, Jr.
DALE C. CHRISTENSEN, JR. (DC-4441)
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Attorneys for Plaintiffs Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

SUPPLEMENTAL DECLARATION OF MICHAEL KRAMER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CLAIMS

MICHAEL KRAMER, pursuant to 28 U.S.C. § 1746 declares:

1. I submit this Supplemental Declaration in support of plaintiffs' motion for summary judgment on their breach of contract claim to provide the Court with plaintiffs' calculation of the principal and interest due and owing plaintiffs as of April 10, 1998. Except for those matters stated on information and belief, I have personal knowledge of the facts set forth herein. The sources of my information and bases of my belief are the documents identified below. Capitalized terms have the same meaning as in my Declaration of December 11, 1997 (which is attached as Exhibit D to the Affidavit of Dale C. Christensen, Jr. in Support of Plaintiffs' Motion for Summary Judgment on their Breach of Contract Claim).

2. According to the GMD Note (which is attached to my Declaration of December 11, 1997 as Exhibit B), interest is payable semi-annually in arrears on February 17 and August 17 of each year at a rate of 3¼ percent per year. (Page 105) Such interest is calculated on the basis of a 360-day year of twelve 30-day months. (*Id.*) Moreover, as provided therein, interest at the rate of 8¼ percent is also owed on any overdue installment of interest. (*Id.*)

3. Based on plaintiffs' Notices of Acceleration, plaintiffs are the beneficial owners of $75,006,000 principal amount of the Notes.

4. As set forth in the calculation attached as Exhibit A, the unpaid and accrued interest due plaintiffs on this amount through April 10, 1998 is $7,317,936 for a total indebtedness of $82,323,936 as of April 10, 1998. As noted in the calculation, interest continues to accrue in the amount of $17,189 per day. Plaintiffs respectfully request that such accrued interest through the date of judgment be included in the judgment.

5. In addition to a money judgment, plaintiffs' respectfully request that the Court issue a turnover order directing defendants to irrevocably assign or transfer to plaintiffs a sufficient amount of toll road Receivables or Government Notes, as the case may be, to satisfy the judgment in plaintiffs' favor. This Court's December 23, 1997 preliminary injunction order presently enjoins defendants from assigning or otherwise transferring their remaining interests in toll road Receivables or Government Notes. Pending such assignment or transfer, plaintiffs respectfully request that the Court continue to enjoin defendants from assigning or transferring such interests to third parties.

6. Based on Defendants' own statements, the monetization rate (i.e., rate of exchange for cash) for toll road Receivables is about 50% of their face amount. Accordingly, $164,647,872 face amount of toll road Receivables is needed to satisfy a judgment in the amount of $82,323,936. (A copy of a letter from defendants' counsel, dated February 12, 1998, setting forth the monetization rates is attached as Exhibit B.)

7. In the event the Court is not inclined to issue a turnover order, plaintiffs respectfully request that the Court convert its preliminary injunction order to a permanent injunction to prevent frustration of the judgment.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 14, 1998 at New York, New York.

/s/ Michael Kramer
MICHAEL KRAMER

CALCULATION OF AMOUNTS OWED

Plaintiff		Principal Amount Owed
Alliance Funds		$54,100,000
Avalon Fund		1,274,000
Elliot Associates, L.P.		2,850,000
Varde Funds		16,782,000
		$75,006,000
Annual Interest Rate—8.25%		
Daily Interest Owed Plaintiffs Under A 360-Day Year	$ 17,189	
August 17, 1997 Interest Payment Owed Plaintiffs	$3,093,998	
Interest Owned Plaintiffs for August 18, 1997 Through April 10, 1998 (236 Days)	$4,056,604	
Interest @ 8.25% Owed Plaintiffs On Overdue Interest ($3,093,998) for August 18, 1997 Through April 10, 1998 (236 Days)	$ 167,334	
Total Interest Owed Plaintiffs		$ 7,317,936
Grand Total Principal Plus Interest Owed as of April 10, 1998		$82,323,936

MORGAN, LEWIS & BOCKIUS LLP
COUNSELORS AT LAW

101 Park Avenue
New York, New York 10178-0060

Richard A. Mescon
212-309-6164

February 12, 1998

VIA FACSIMILE

Andrew J. Wertheim, Esq.
Duncan Darrow, Esq.
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Dale C. Christensen, Jr., Esq.
Seward & Kissel
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New York, New York 10004

Re: Alliance Bond Fund et al. v. Grupo Mexicano De Desarrollo, S.A., et al. 97 Civ. 9165 (JSM)

Gentlemen:

While our discussions over the last week have not resulted in a final agreement, I believe they have been useful in focusing and narrowing the issues. Some of the points you have raised have helped us and our client to clarify our thinking with regard to the pending application before Judge Martin.

I am therefore writing to let you know, in advance of the hearing, the specific nature of the relief we will be requesting, which I think is somewhat more concrete than our original statement of position.

Rather than asking that $7,073,000 in dollars be generated by receivables released from the preliminary injunction, we will only be requesting that $7,073,000 face amount of receivables be released. We plan to "monetize" these receivables by selling them to a financial institution. In such a sale we would expect to receive about 50% of the face amount of the receivables at the time of the sale and the balance of the face amount (less a financing component based on current Mexican interest rates) at the time the Toll Road Notes are issued by the Mexican Government. Since it is our hope and expectation that the Toll Road Notes will be released by the Government within about a month, this plan would generate for GMD all of the needed cash for ongoing operations during the first quarter (though GMD would not receive all of the cash at the time of sale of the receivables). If the Toll Road Notes are released in that time frame, GMD will comply with your request for a monetization rate of at least 90%.

Such a plan, to succeed, would of course require the Mexican Government's prompt issuance of at least some portion of the Toll Road Notes. I understand that our client is still soliciting your cooperation in achieving this result.

Sincerely,

/s/ Richard A. Mescon
RICHARD A. MESCON

RAM/dl

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 97-9610

ALLIANCE BOND FUND, INC., *et al.*,
Plaintiffs-Appellees,
v.

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Defendants-Appellants.

PLAINTIFFS-APPELLEES' SUGGESTION OF MOOTNESS

Plaintiffs-Appellees ("Plaintiffs") respectfully suggest that this appeal of the December 23, 1997 order of the United States District Court for the Southern District of New York, the Honorable John S. Martin ("District Court") granting Plaintiff's motion for a preliminary injunction is moot because, on April 17, 1998, the District Court entered final judgment in Plaintiffs' favor against Defendants, a copy of which is attached hereto.

Dated: April 17, 1998
New York, New York

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Andrew J. Wertheim
ANDREW J. WERTHEIM (AW-1554)
DUNCAN N. DARROW
666 Fifth Avenue
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Attorneys for Plaintiffs-Appellees Elliot Associates, L.P., Avalon Total Return Fund, L.P., The Varde Fund, L.P., The Varde Fund II-B, L.P., The Varde Fund III-A, L.P., The Varde Fund III-B, L.P., and The Varde Fund IV-A, L.P.

-and-

SEWARD & KISSEL

By: /s/ Dale C. Christensen, Jr.
DALE C. CHRISTENSEN, JR. (DC-4441)
One Battery Park Plaza
New York, New York 10004
(212) 575-1200
Attorneys for Plaintiffs-Appellees Alliance Bond Fund, Inc., Alliance World Dollar Government Fund II, Inc., and Alliance Global Dollar Government Fund, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 9165 (JSM)

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INFRAESTRUCTURA, S.A. de C.V., OBRAS Y PROYECTOS, S.A. de C.V., DESARROLLO URBANO INTEGRAL, S.A. de C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. de C.V.,

Defendants.

ORDER

WHEREAS, Plaintiffs moved on February 19, 1998 (1) pursuant to Fed. R. Civ. P. 56(c) for an award of summary judgment on their claim against Defendants for breach of contract in the amount of at least $80,194,054 as of December 12, 1997 together with accruing prejudgment interest and (2) pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss with prejudice Defendants' counterclaims asserted in their Answer and Counterclaims, dated January 8, 1998;

WHEREAS, Defendants submitted no opposition to the aforesaid motions to the extent the motions seek a money judgment in Plaintiffs' favor and dismissal of the counterclaims with prejudice;

WHEREAS, Plaintiffs also moved for an order directing Defendants to irrevocably assign or transfer to Plaintiffs a sufficient amount of toll road Receivables or Government Notes (as those terms are defined in the moving papers) to satisfy the judgment or, alternatively, for an order converting the Court's preliminary injunction order of December 23, 1997 to a permanent injunction;

WHEREAS, the Court issued a preliminary injunction on December 23, 1997 enjoining Defendants from assigning or otherwise transferring their interests in the toll road Receivables or Government Notes pending the outcome of this action;

NOW, THEREFORE, upon consideration of the filings and evidence submitted by the parties, the arguments of counsel, and all the pleadings and prior proceedings herein, and due deliberation having been had, it is hereby ORDERED that:

1. Plaintiffs' motion for summary judgment on their breach of contract claim is granted; and plaintiffs are awarded judgment in the amount of $82,444,259.00;

2. Plaintiffs' motion to dismiss Defendants' counterclaims with prejudice is granted;

3. Plaintiffs' motion for an order directing Defendants to irrevocably assign or transfer to Plaintiffs a sufficient amount of toll road Receivables or Government Notes to satisfy the judgment is granted;

4. Pending such assignment or transfer, the restraints as stated in the preliminary injunction order issued on December 23, 1997 shall continue and are incorporated herein by reference; and

5. The preliminary injunction ordered December 23, 1997 is converted to a permanent injunction effective until the defendant meets its obligation set forth in paragraph 3.

6. Defendants' obligation in paragraph 3 is stayed for 10 days.

Dated: New York, New York
April —, 1998

/s/ John S. Martin, Jr.
HON. JOHN S. MARTIN, JR.
United States District Judge
4/17/98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that Defendants Grupo Mexicano de Desarrollo, S.A., Desarrollo de Infraestructura, S.A. de C.V., Obras Y Proyectos, S.A. de C.V., Desarrollo Urbano Integral, S.A. de C.V., and Desarrollo Industrial Latinoamericano, S.A. de C.V., (collectively "GMD") hereby appeal to the United States Court of Appeals for the Second Circuit from:

1. So much of this Court's Order dated April 17, 1998 and this Court's Judgment dated April 17, 1998 ("the Judgment") which order GMD to irrevocably assign or transfer a sufficient amount of toll road receivables or Mexican Government notes to plaintiffs to satisfy the Judgment; and

2. So much of this Court's Order dated April 17, 1998 and this Court's Judgment dated April 17, 1998 converting this Court's preliminary injunction dated December 23, 1997 into a permanent injunction effective until GMD irrevocably assigns a sufficient amount of toll road receivables or Mexican Government notes to plaintiffs to satisfy the Judgment.

The Order and Judgment are attached hereto.

Dated: New York, New York
April 20, 1998

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Laurie E. Foster
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Attorneys for Defendants

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(212) 506-5000

Dale C. Christensen, Jr., Esq.
Seward & Kissel
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(212) 574-1200
Attorneys for Plaintiffs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of May, one thousand nine hundred and ninety-eight.

PRESENT: HONORABLE JOSEPH M. MCLAUGHLIN,
HONORABLE PIERRE N. LEVAL,
Circuit Judges.
HONABLE MILTON POLLACK,
District Judge.

Docket No. 97-9610

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVENMENT FUND, INC.; ELLIOTT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

Plaintiffs-Appellees,

v.

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A., DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V.; and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants-Appellants.

ORDER

So much of the District Court's Order and Judgment as requires Defendants to irrevocably assign or transfer certain notes and receivables to Plaintiffs within ten business days is stayed pending appeal. The rest of the Order and Judgment, including the entry of permanent injunction, is unaffected by this Order and remains effective.

FOR THE COURT:
GEORGE LANGE III
Clerk

By: /s/ Lucille M. Carr
LUCILLE M. CARR,
Operations Manager

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 4th day of May, one thousand nine hundred and ninety-eight.

PRESENT: HONORABLE JOSEPH M. MCLAUGHLIN,
HONORABLE PIERRE N. LEVAL,
Circuit Judges.
HONORABLE MILTON POLLACK,*
District Judge.

No. 98-7549

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVENMENT FUND, INC.; ELLIOTT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

Plaintiffs-Appellees,

-v.-

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A., DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V.; and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants-Appellants.

---

*The Honorable Milton Pollack, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

SUMMARY ORDER

Alliance Bond Fund v. Grupo Mexicano, No. 98-7549

Plaintiff Alliance Bond Fund moves to dismiss the appeal on the grounds that it is moot. The motion is denied. *Meyers v. Jay Street Connecting R.R.*, 288 F.2d 365 (2d Cir. 1961).

/s/ Joseph M. McLaughlin
HON. JOSEPH M. MCLAUGHLIN

/s/ Pierre N. Leval
HON. PIERRE N. LEVAL
Circuit Judges

/s/ Milton Pollack
HON. MILTON POLLACK
District Judge

[Filed May 6, 1998]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLIANCE BOND FUND, INC., ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC., ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC., ELLIOT ASSOCIATES, L.P., AVALON TOTAL RETURN FUND, L.P., THE VARDE FUND, L.P., THE VARDE FUND II-A, L.P., THE VARDE FUND II-B, L.P., THE VARDE FUND III-A, L.P., THE VARDE FUND III-B, L.P., and THE VARDE FUND IV-A, L.P.,

Plaintiffs,

-against-

GRUPO MEXICANO DE DESARROLLO, S.A., DESARROLLO DE INTRAESTRUCTURA, S.A. de C.V., OBRAS Y PROYECTOS, S.A. de C.V., DESARROLLO URBANO INTEGRAL, S.A. de C.V. and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants.

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned counsel for the parties hereto, that defendants' time to irrevocably assign or transfer to plaintiffs a sufficient amount of Toll Road Receivables or Government Notes to satisfy the Judgment herein, as provided in this Court's Order and in this Court's Judgment, both dated April 17, 1998, is hereby extended from May 1 to May 8, 1998. All other provisions in such Order and Judgment shall remain unchanged and in full force and effect.

Dated: New York, New York
May 1, 1998

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SO ORDERED:

Dated: New York, New York
May 5, 1998

/s/ John S. Martin, Jr.
JOHN S. MARTIN, JR., U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of May, one thousand nine hundred and ninety-eight.

PRESENT: HON. JOSEPH M. MCLAUGHLIN
HON. PIERRE N. LEVAL
Circuit Judges
HON. MILTON POLLACK
District Judge*

Docket No: 97-9610

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P.; and THE VARDE FUND IV-A, L.P.,

Plaintiffs-Appellees,

v.

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V.; and DESARROLLO INDUSTRIAL LATINOAMERICANO, S.A. DE C.V.,

Defendants-Appellants.

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*The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
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Issued As Mandate 5-27-98 Administrative Attorney

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

No. 98-231

In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners

v.

ALLIANCE BOND FUND, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a United States District Court, sitting in diversity, is empowered to issue a preliminary injunction prohibiting a defendant from transferring or assigning assets unrelated to the plaintiff's underlying claim and held outside of the court's jurisdiction in order to ensure that funds will be available to satisfy a potential money judgment.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners Grupo Mexicano de Desarrollo, S.A.; Desarrollo de Infraestructura, S.A. de C.V.; Obras Y Proyectos, S.A. de C.V.; Desarrollo Urbano Integral, S.A. de C.V. and Desarrollo Industrial Latinoamericano, S.A. de C.V. hereby certify that Grupo Mexicano de Desarrollo, S.A. is the corporate parent of the other named petitioners.

AMENDED LIST OF NON-WHOLLY OWNED SUBSIDIARIES

Grupo Mexicano de Desarrollo, S.A.'s additional non-wholly owned subsidiaries are:

Promotora Domus, S.A. de C.V.;
Welinns de Mexico, S.A. de C.V.;
Desarrollos Hidraulicos de Morelos, S.A. de C.V.;
Concesionaria Mexicana de Vias Terrestres, S.A. de CV;
Promotora JL, S.A. de C.V.

Desarrollo de Infraestructura, S.A. de C.V.'s additional non-wholly owned subsidiaries are:

Promotora JL, S.A. de C.V.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-231

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*, *Petitioners*

v.

ALLIANCE BOND FUND, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 143 F.3d 688. The order of the district court issuing the preliminary injunction (Pet. App. 22a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on May 6, 1998. The petition for a writ of certiorari was filed on August 4, 1998, and was granted on November 30, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

This case involves Rules 64 and 65 of the Federal Rules of Civil Procedure. (Pet. App. 60a-63a). New York Civil Practice Law and Rules §§ 6201 and 6301 are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This appeal addresses the question whether a federal district court, sitting in diversity, has the inherent equitable power to issue a preliminary injunction to preserve assets for a potential money judgment when such relief is unavailable under the law of the state in which the district court sits.

Petitioners, a consortium of Mexican construction companies ("GMD"), issued $250,000,000 of unsecured notes (the "Guaranteed Notes"), approximately $76,000,000 of which were purchased by respondents, the plaintiffs below. (C.A. 235, 240).[1] GMD defaulted on an interest payment on those notes and respondents filed a complaint in the district court alleging breach of contract.[2] (J.A. 23-32). Respondents also sought a temporary restraining order and a preliminary injunction to restrain GMD from using its primary asset—the right to receive approximately $309,000,000 of unrelated notes to be issued by the Mexican Government (the "Toll Road Notes"). (J.A. 30-31).

In seeking the injunction, respondents argued that injunctive relief was necessary to ensure that GMD, which had already assigned to certain creditors in Mexico its right to receive a portion of the Toll Road Notes, did not make further assignments that might prefer other creditors over respondents and might frustrate enforcement of a potential money judgment in respondents' favor. (J.A. 30-31). Respondents also cited the possible insolvency of GMD

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[1] "C.A." refers to the confidential joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2] The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because the amount in controversy exceeded $75,000, exclusive of interest and costs, and the action was between citizens of a state and citizens or subjects of a foreign state. In issuing the Guaranteed Notes, GMD consented to personal jurisdiction in New York solely in connection with the notes. GMD has no business or assets in New York or in the United States. (C.A. 147).

as a justification for the injunction. (J.A. 30). There was no suggestion that the prior assignments in favor of the other creditors were not on account of valid obligations of GMD. (J.A. 29-30). The district court granted respondents' motion for a temporary restraining order on December 12, 1997 (Pet. App. 55a-57a) and respondents' motion for a preliminary injunction on December 23, 1997. (Pet. App. 22a-27a). The court of appeals affirmed the preliminary injunction by opinion and order dated May 4, 1998. (Pet. App. 1a-21a).

The decision of the court of appeals was erroneous (a) because a district court lacks the inherent equitable power to issue such a preliminary injunction in an action for money damages and (b) because a district court sitting in diversity in New York must apply New York law, which does not permit such an injunction to issue.

A. Background

GMD, the fourth largest construction company in Mexico, is engaged in the construction of a broad range of public works and infrastructure projects in Mexico and throughout Latin America, including highways and toll roads, bridges, tunnels, water works, dams, airports, and port facilities. (C.A. 234). For example, GMD has constructed toll roads throughout Mexico and operates the water purification and delivery systems for the City of Cancún. (C.A. 234).

The Guaranteed Notes

In February 1994, GMD issued to institutional investors $250 million of Guaranteed Notes due in 2001, for general corporate purposes. (C.A. 235). Interest payments, at the rate of 8¼ percent per annum, were scheduled to be made on February 17 and August 17 of each year. (C.A. 235). The Guaranteed Notes constitute unsecured obligations that rank *pari passu* in priority of

payment with all other general unsecured indebtedness of GMD. (C.A. 235-36).

The Mexican Toll Road Rescue Program

From approximately 1990 through 1994, GMD participated in the Mexican Government's program to develop a modern intercity highway network. (C.A. 236). Under this program, the Mexican Government granted concessions to private companies (the "Toll Road Concessionaires") to build and operate toll roads throughout Mexico. (C.A. 236). The Toll Road Concessionaires engaged construction companies, such as GMD, to build the roads. (C.A. 76-79). GMD and the other construction companies then billed the Toll Road Concessionaires for that construction. (C.A. 76-79).

Commencing in late 1994, Mexico went through a period of severe economic dislocation leading to the devaluation of the peso. (C.A. 236). As a result of this economic downturn, toll road traffic and revenues fell below anticipated levels, causing the Toll Road Concessionaires to suffer substantial losses. (C.A. 236). These losses, in turn, prevented the Toll Road Concessionaires from paying the debts owed to GMD and the other construction companies. (C.A. 67). In an effort to facilitate the continued success of the toll road construction program, the Mexican Government implemented the Toll Road Rescue Program on September 1, 1997. (C.A. 236). Under the terms of the Toll Road Rescue Program, the Mexican Government promised to issue government-guaranteed Toll Road Notes to GMD and other toll road construction companies to reimburse them for approximately one third of the unpaid construction receivables and expenses (the "Toll Road Receivables") owed by the Toll Road Concessionaires. (C.A. 236-37). Certain of the Toll Road Receivables are eligible to be paid with Toll Road Notes when those notes are issued by the Mexican Government. (C.A. 7). In return, the Mexican Government assumed

ownership and operation of the toll roads. (C.A. 236). GMD disclosed in its Third Quarter 1997 financial statements that preliminary estimates indicated that it expected to receive $309 million under the Toll Road Rescue Program. (C.A. 236).

GMD's Restructuring Efforts

The Toll Road Notes will compensate GMD for only a small portion of the approximately $961.4 million invested by GMD in the construction of the Mexican toll roads. (C.A. 237). GMD could not sustain such losses and has instituted plans to restructure its debt, reduce its costs, and seek additional equity contributions in order to improve its financial situation. (C.A. 237). Such efforts were not kept secret from respondents or GMD's other creditors. (C.A. 237). For example, a Reuters Report dated August 26, 1997, and received by respondents on August 27, 1997, indicated that GMD had begun to renegotiate its $256 million debt to its Mexican banks, and that it would seek a discount from the banks of 67 percent to match GMD's losses from its expenditures on toll road construction. (C.A. 237). This report also made clear that, although GMD would begin its restructuring efforts by negotiating with its Mexican banks and other creditors, it would also address the holders of the Guaranteed Notes. (C.A. 263).

GMD's restructuring efforts included the irrevocable assignment of $30 million in Toll Road Receivables to a Mexican trust created to fund employee severance packages estimated at approximately $17 million. (C.A. 237, 286).[3] The severance packages were owed to the employees under Mexican law as the result of GMD's reduction of its work force in connection with the company's efforts to restructure its operations. (C.A. 237). GMD

[3] Any assignment made in excess of the amounts owed by GMD will be returned to GMD upon issuance of the Toll Road Notes. (C.A. 286).

then assigned $137 million of Toll Road Receivables to the Mexican Treasury Minister and Social Security Institute to pay approximately $100 million in taxes owed to the Mexican Government as required by the terms of the Toll Road Rescue Program. (C.A. 238, 286). GMD also assigned an additional $38 million in Toll Road Receivables to a Mexican bank in exchange for working capital credits to permit GMD to continue operations pending receipt of amounts due under the Toll Road Rescue Program. (C.A. 238).

In October 1996, prior to the announcement of the Toll Road Rescue Program, GMD had also assigned approximately $42 million in Toll Road Receivables owed to GMD by the Toll Road Concessionaires to pay several outstanding loans. (C.A. 287). Those Toll Road Receivables are also eligible to be paid with Toll Road Notes when they are issued.

Negotiations Between GMD And The Noteholders

Since September 1997, GMD has been involved in negotiations with the holders of the Guaranteed Notes in an effort to facilitate a restructuring of GMD's finances and a settlement of GMD's obligations towards the holders of the Guaranteed Notes. (C.A. 238). Various proposals were made but the parties were unable to reach an agreement. (C.A. 238-40). This resulted in the respondents filing their complaint and application for a preliminary injunction.

B. The Decisions Below

The district court found that respondents "satisfied their burden for the issuance of a preliminary injunction because: (1) they would almost certainly succeed on their breach of contract claims against GMD; and (2) without the injunction they faced an irreparable injury since GMD's financial condition and dissipation of assets would frustrate any judgment recovered." (Pet. App. 6a). The

preliminary injunction, which was in effect for four months (from December 23, 1997 through April 17, 1998), interfered with GMD's efforts to restructure its debt and substantially impaired GMD's ability to continue its operations in the ordinary course of business. If the decision of the court of appeals is reversed, GMD will be entitled to damages to the extent that it can show harm resulting from the wrongful issuance of the injunction. *See, e.g., H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17-18 (2d Cir. 1963).[4]

On appeal, GMD, which has no assets or operations in the United States, challenged the district court's authority to issue a preliminary injunction prohibiting GMD from transferring or conveying assets that are unrelated to respondents' underlying claim and are held outside the court's jurisdiction. GMD did not contest the district court's findings of irreparable harm or the likelihood that respondents might ultimately prevail on the merits.

The court of appeals affirmed, holding that a district court may exercise its "general equitable power" to issue a preliminary injunction "to ensure the preservation of an adequate remedy." (Pet. App. 12a). The court of appeals explicitly recognized that other circuits had rejected the notion that a federal district court may exercise its inherent powers to enjoin a defendant's use of assets that bear no relationship to the plaintiff's underlying claim. (Pet. App. 13a). Since the decision of the court of appeals, the Fourth Circuit has joined the Fifth, Tenth, and Eleventh Circuits in holding that a preliminary injunction may not issue in these circumstances. *See United States v. Cohen*, 152 F.3d 321 (4th Cir. 1998).

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[4] Respondents filed a "Suggestion of Mootness" with the court of appeals on April 17, 1998, contending that GMD's appeal was moot because the district court had entered a final judgment in respondents' favor. (J.A. 108-09). That "Suggestion of Mootness" was rejected by the court of appeals by order dated May 4, 1998. (J.A. 117-18).

C. Subsequent Proceedings

While GMD's appeal was *sub judice,* respondents moved in the district court for summary judgment and, simultaneously, for an order directing GMD to assign irrevocably to respondents a sufficient quantity of Toll Road Receivables or Toll Road Notes to satisfy respondents' judgment (the "Turnover Order"). (J.A. 110-11). Both motions were granted by judgment and order dated April 17, 1998. (J.A. 110-12).

GMD has appealed the propriety of the Turnover Order. The decision of the district court has been stayed by the court of appeals pending the outcome of that appeal. (Docket No. 98-7549, argued on December 10, 1998.)

SUMMARY OF ARGUMENT

The decision of the court of appeals expands the district court's inherent power to issue injunctive relief beyond that recognized by this Court or authorized at common law. This Court has sanctioned the use of preliminary injunctive relief in equitable actions to restrain a defendant's use of specific assets directly related to the plaintiff's claim in order to preserve those assets for an ultimate judgment. This Court has never condoned a district court's issuance of a preliminary injunction to secure a potential money judgment.

The inherent powers of a federal district court are those necessary for the performance of its duties and the administration of justice. They are rooted in the common law equity tools of the English Courts of Chancery to be exercised only in those exceptional circumstances in which congressionally authorized powers fail to protect the processes of the court. There is, however, no common law predicate for the preliminary injunction issued by the district court. In fact, the relief granted by the district court was expressly unavailable at common law. Moreover, under the Rules Enabling Act, a mechanism has been

provided for the district courts to preserve a defendant's assets to ensure satisfaction of a potential money judgment. That mechanism is encompassed in Rule 64 of the Federal Rules of Civil Procedure which directs the district courts to rely on state law provisional remedies. Rule 65 of the Federal Rules of Civil Procedure, by contrast, merely dictates the proof requirements for determining whether a preliminary injunction may issue in a particular case. Absent some other congressional mandate or inherent equitable power recognized at common law, a district court has no authority to issue preliminary injunctive relief.

But even apart from the broad question of whether a federal district court ever may exercise some inherent power to enjoin a defendant's use of assets to secure a potential money judgment, the preliminary injunction in this case was improper. This is a diversity action, and a district court sitting in diversity should be precluded from issuing an injunction when such relief is unavailable under state law. This Court's decisions, beginning with *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), dictate that a federal court exercising diversity jurisdiction should apply state law unless: (i) a federal statute or Federal Rule of Civil Procedure controls the issue before the court and that provision represents a valid exercise of Congress' constitutional power or (ii) the application of federal judge-made law simply does not implicate the concerns of *Erie*—discouraging forum shopping and ensuring the equitable administration of the laws.

In this case, the district court relied on its inherent powers, not a federal statute or Federal Rule of Civil Procedure, to issue the preliminary injunction. There is no dispute that the injunction could not have been issued by a New York state court judge. Consistent with *Erie*, the district court should not have exercised its asserted inherent powers in contravention of New York law. By enjoining GMD from using its assets in order to preserve funds to satisfy a potential money judgment, the district

court (and the court of appeals) gave respondents an advantage that a New York state court judge could not provide. The result is that plaintiffs able to comply with 28 U.S.C. § 1332 can avail themselves of the more liberal provisional remedies available in federal district court. Under ths regime, a defendant in complete diversity with the plaintiff could be subjected to restraints on its assets that could not be imposed on a New York defendant in an action brought by a New York plaintiff.

ARGUMENT

I. A FEDERAL DISTRICT COURT DOES NOT HAVE THE POWER TO ISSUE A PRELIMINARY INJUNCTION TO RESTRAIN A DEFENDANT'S USE OF ASSETS IN ORDER TO PRESERVE FUNDS TO SATISFY A POTENTIAL MONEY JUDGMENT

This Court has never held that a federal district court may issue a preliminary injunction to preserve assets to satisfy a potential money judgment. This Court has held only that a preliminary injunction is available when a plaintiff, in an action for equitable relief, seeks an injunction with respect to the same *res* or thing that is the subject of its underlying claim. Neither Fed. R. Civ. P. 65 nor common law principles countenance the preliminary injunction issued by the district court.

A. This Court Has Never Authorized The Issuance Of A Preliminary Injunction To Secure A Potential Money Judgment

This Court first addressed the propriety of preliminary injunctive relief to preserve assets for a final judgment in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In *Deckert*, purchasers of securities brought suit under the federal securities laws to rescind contracts that they alleged were induced by fraud. The securities were held in a trust administered by a third party trustee. The plaintiffs sought and were awarded a preliminary injunction restraining the trustee from transferring or otherwise disposing of trust assets purchased with funds that the plaintiffs alleged they were fraudulently induced to pay. *Id.* at 285. This Court affirmed the issuance of the injunction, holding that it was "a reasonable measure to preserve the status quo pending final determination" of the suit because the plaintiffs had shown that there was a danger that the defendant would dissipate or deplete the assets contained in the trust in anticipation of an adverse judgment. *Id.* at 290. *Deckert* stands for the proposition that a preliminary equitable remedy will issue to preserve a final equitable remedy of restitution or constructive trust when the plaintiff has an equitable claim to a specific *res* or thing in the possession of the defendant.

In *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945), this Court refined its decision in *Deckert* by holding that a preliminary injunction may not issue to secure assets for a final judgment if the assets to be restrained are not of the same "character" as the subject of the plaintiff's underlying action. In *De Beers*, the United States commenced an action against several foreign corporations and individuals alleging that they had "engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds" in violation of the Sherman Act and the Wilson Tariff Act. *Id.* at 215. The ultimate relief sought in the complaint was a permanent injunction preventing and restraining future violations of the law. Upon commencement of the action, the United States sought a preliminary injunction restraining the defendants from "selling, transferring or disposing of any property in the United States" until the court could adjudicate the government's claims. *Id.* The government predicated its request for injunctive relief on the grounds that "[t]he principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this court may render." *Id.* In reversing

the decision of the lower court, this Court held that issuance of the preliminary injunction was improper because "it deal[t] with a matter lying wholly outside the issues in the suit." *Id.* at 220.

The Court distinguished *Deckert* on the grounds that the injunction in that case restrained the trustee from transferring specific property that was directly related to plaintiff's securities fraud claim and that therefore would have been the subject of a final decree. By contrast to the situation in *De Beers*, in *Deckert* there was an identifiable *res* at issue in the lawsuit, and an injunction could issue with respect to that *res*. The *De Beers* court recognized the dangers of extending a district court's equitable powers to issue preliminary injunctions outside of the subject matter of the plaintiff's claim:

> To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. *Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him,* indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. *No relief of this character has been thought justified in the long history of equity jurisprudence.*

325 U.S. at 222 (emphasis added).[5]

[5] In *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1528 (11th Cir. 1994), the court of appeals interpreted this language in *De Beers* as suggesting that "the case before [the Court] was worthy of discussion because the United States was, at least, seeking *equitable* relief in the underlying litigation, albeit an injunction that was not of the same 'character' as the preliminary injunction freezing the defendant's assets. It appears to juxtapose that situation against a case seking money damages in tort or contract in which a preliminary injunction freezing assets is requested; in such a case, the Court's language makes clear, a prejudgment asset freeze, without a doubt, would be beyond the power of the district court." (Emphasis in original.)

In *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), this Court applied the *De Beers* analysis to an action brought by the United States to foreclose a tax lien that previously had been placed on the New York bank accounts of a foreign taxpayer; the government did not sue for money damages. In reversing the court of appeals and sustaining the district court's issuance of an injunction prohibiting the bank from transferring any of the assets it held for the account of the taxpayer, the Court emphasized that the ultimate relief sought in the litigation involved the very same bank accounts and held that "[u]nlike *De Beers* . . . there is here property which would be 'the subject of the provisions of any final decree in the cause.' " *Id.* at 385. Thus, like *Deckert*, *First Nat'l* addressed a circumstance in which there was an identifiable *res*—a group of bank accounts already encumbered by a federal tax lien—that was the subject of the plaintiff's underlying claim.

In this case, the court of appeals held that "*Deckert* and *First Nat'l* endorse the district court's exercise of general equitable power to ensure the preservation of an adequate remedy." (Pet. App. 12a). The court of appeals distinguished *De Beers* as "simply inapplicable to cases in which a litigant seeks money damages." (Pet. App. 11a). Under the court of appeals' analysis, *De Beers* applies only to circumstances in which the remedy sought by plaintiffs is injunctive relief. *Id.* This interpretation of *De Beers* stands the rationale for this Court's decisions on its head. It leads to the anomalous conclusion that a district court presiding over an action at law for money damages has more expansive power to award interim equitable relief, *i.e.*, to issue a preliminary injunction, than a court adjudi-

cating an equitable claim. The courts of appeals that have adopted this view have offered no principled explanation for such an illogical result.[6] In fact, this Court's decisions and fundamental common law principles suggest that a district court's inherent power is not so expansive as to authorize the issuance of a preliminary injunction to restrain a defendant's use of assets to preserve a potential money judgment.

B. The Inherent Powers Of The District Courts Do Not Provide A Basis For The Injunction Issued Here

The inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812). The doctrine of inherent powers provides a federal district court "with appropriate instruments required for the performance of [its] duties and essential to the administration of justice." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978), *quoting In re Peterson*, 253 U.S. 300, 312 (1920). The doctrine recognizes that "a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (sub-

[6] Like the court of appeals in this case, the First, Third, Sixth, and Ninth Circuits have permitted the use of a prelimnary injunction to preserve unrelated assets to secure satisfaction of a potential money judgment. *See In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 205 (3d Cir. 1990); *EBSCO Indus., Inc. v. Lilly*, 840 F.2d 333, 334-36 (6th Cir.), *cert. denied*, 488 U.S. 825 (1988); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986).

By contrast, the Fourth, Fifth, Tenth, and Eleventh Circuits have held that, under *De Beers*, an injunction may issue only to restrain the same "*res*" or "thing" that is the subject of plaintiff's underlying equitable claim. *See Cohen*, 152 F.3d at 324; *Rosen*, 21 F.3d at 1527; *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1521 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995); *Home-Stake Prod. Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1021 (10th Cir. 1990); *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988).

ject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." *Id.* at 1359. However, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO*, 501 U.S. 32, 44 (1991), *citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

The federal district courts have relied on the concept of inherent powers "to impose several species of sanctions on those who abuse the judicial process."[7] *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985). This Court has approved the district courts' exercise of their inherent equitable powers in the issuance of sanctions for contempt (*see, e.g., Levine v. United States*, 362 U.S. 610, 615 (1960)), the dismissal of actions for failure to prosecute (*see, e.g., National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962)), and the suspension or reprimand of attorneys for abuse of the judicial process (*see, e.g., Ex Parte Wall*, 107 U.S. 265, 288-89 (1883)). The decisions of this Court recognize that a federal district court's exercise of its inherent authority is appropriate only in circumstances where such long unquestioned "power is of ancient origin." *Link*, 370 U.S. at 630-31. *See also Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945) ("[e]quitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery,"); *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) ("[t]he 'jurisdiction' . . . conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being adminis-

[7] Here, there was no finding by the district court that GMD abused the judicial process or attempted to perpetrate a fraud on the court. Rather, GMD merely had sought to pay certain of its *bona fide* creditors before respondents.

tered by the English Court of Chancery at the time of the separation of the two countries"); *Payne v. Hook*, 7 Wall. (74 U.S.) 425, 430 (1868) ("[t]he equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses").

There is no traditional predicate for the preliminary injunction issued by the district court in this case. In fact, until 1975, the English Courts of Chancery did not possess the power to grant an interlocutory order enjoining a defendant from disposing of its assets or removing them from the jurisdiction before a judgment was rendered. *See Lister & Co. v. Stubbs*, 1890 45 Ch.D. 1 (Eng. C.A.). *Lister* involved a claim for damages in which a manufacturing company alleged that its employee had engaged in self-dealing. The plaintiff sought preliminarily to enjoin the employee from selling property he had purchased with the undisclosed profits and commissions so that such property would be available to satisfy an ultimate judgment in plaintiff's favor. The court denied the plaintiff's request for preliminary relief, because the plaintiff could not show that the undisclosed commissions received by the defendant (and used to purchase the property) was money belonging to the plaintiff. The *Lister* court distinguished the case before it from a situation in which the plaintiff claimed a trust or some actual proprietary right or interest that attached to the money itself or the asset or thing that was the subject of the action, *i.e.*, an injunction would have been available if the plaintiff had asserted an equitable claim to a specific *res* in the possession of the defendant. *See also* D.W. Shenton, *Attachments and Other Interim Court Remedies in Support of Arbitration: The English Courts*, 1984 Int'l Bus. Law 101.

The English courts only recently have authorized the use of injunctive relief to preserve assets to satisfy a potential money judgment. *See Mareva Compania Naviera, S.A. v. International Bulk Carriers, S.A.*, 1975 2 Lloyd's Rep. 509 (Eng. C.A.); The Supreme Court Act of 1981,

cn. 54 § 37(3) (Eng.).[8] Indeed, in responding to the plaintiff's request for a "Mareva" injunction in the House of Lords case, *Siskina Cargo Owners v. Distos Compania Naviera, S.A.*, AC 210 HL (1979), Lord Hailsham said "[t]hree years ago I would have regarded the [plaintiff's] case as wholly inarguable."

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[8] In *Mareva*, the Court of Appeal rejected long-standing precedent in holding that a preliminary injunction may issue to prevent a defendant from removing assets from the jurisdiction until the conclusion of a trial on the merits upon a showing that (i) a debt is due and owing and there is a danger the debtor might dispose of the assets before judgment, and (ii) if the Court does not issue an injunction, the plaintiff would suffer a great injustice that the Court had the power to help avoid. 2 Lloyd's Rep 509. *Mareva* arose as the result of nonpayment of a debt arising from the charter of a ship. The shipowners issued a writ claiming unpaid hire and damages for repudiation and applied for an *ex parte* injunction restraining the charterer from disposing of monies received as the result of a sub-charter. The trial judge granted the requested injunction for a limited period of time but refused to extend it until after the trial. The shipowners appealed. In ordering the injunction extended until a judgment was rendered, the Court of Appeal recognized that injunctions of this type have "in the past from time to time been applied for but ha[ve] been consistently refused." *Id.* The Court of Appeal relied, however, on Section 45 of the Judicature Act for the principle that "a mandamus or an injunction may be granted . . . in all cases in which it shall appear to the court to be just or convenient." *Id.* Since *Mareva*, English courts have granted what have become known as "Mareva" injunctions to restrain defendants from using or dissipating assets to prevent frustration of potential money judgments. Section 37(3) of the Supreme Court Act of 1981 now provides the statutory predicate for the issuance of a Mareva injunction:

> The power of the High Court . . . to grant an interlocutory injunction restraining a party . . . from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable. . . .

In 1990, the English Court of Appeal sanctioned an expansion of Mareva injunctions to cover assets held outside of the jurisdiction of the English courts. *See, e.g., Republic of Haiti v. Duvalier*, 1990 1 QB 202 (Eng. C.A.).

Unlike in England, in the United States it is exclusively for Congress to extend the inherent powers of the federal courts beyond those that existed at common law. *See, e.g., Snyder v. Harris,* 394 U.S. 332, 340 (1969). Accordingly, absent some common law predicate or congressional initiative, the district court did not possess the inherent power to issue an injunction restraining GMD's use of its assets to preserve funds to satisfy a potential money judgment.

C. The Inherent Powers Of The District Courts Should Not Be Exercised When A Federal Statute Or Federal Rule Of Civil Procedure Is Applicable

This Court should be particularly circumspect in recognizing an inherent power when it provides a means for the district courts to circumvent the provisions of a federal rule. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner,* 447 U.S. 727, 737 (1980). Accordingly, a "district court should rely on text-based authority derived from Congress rather than inherent power in every case where the text-based authority applies." *Chambers,* 501 U.S. at 64-65 (Kennedy, J., dissenting), *citing Societe Internationale v. Rogers,* 357 U.S. 197, 207 (1958); *Bank of Nova Scotia,* 487 U.S. at 254.

Although Fed. R. Civ. P. 64 does not state in so many words that it is the exclusive source of district court authority to grant provisional remedies, the rule in fact constitutes the only textural basis for a district court's authority to grant such relief.[9] Fed. R. Civ. P. 64 pro-

[9] As discussed in Point II, B. 1, *infra,* Fed. R. Civ. P. 65 establishes the procedural proof requirements for determining whether a preliminary injunction or restraining order may issue in a particular case, but that rule does not itself authorize preliminary injunctive relief.

vides that a federal district court (whether exercising subject matter jurisdiction on the basis of diversity or some other ground) must apply state law in fashioning provisional remedies to secure satisfaction of a judgment unless the Constitution or a federal statute provides otherwise.[10] Fed. R. Civ. P. 64 provides, in pertinent part, that

> all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought . . . .

(Pet. App. 60a). Fed. R. Civ. P. 64 expressly identifies arrest, attachment, garnishment, replevin, and sequestration as available remedies, along with "other corresponding or equivalent remedies, however designated." (Pet. App. 60a). As this Court explained in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters Local 70,* 415 U.S. 423, 436-37 n.10 (1974), "long-settled federal law provide[s] that in all cases in federal court, . . . state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered."

Although in this case GMD's property was not technically "seized" (i.e., GMD was not deprived of physical possession of the Toll Road Receivables that entitled it to receive Toll Road Notes), the practical implications were the same. GMD was "enjoined and restrained from dissipating, disbursing, transferring, conveying, encumbering, or otherwise distributing or affecting" its interest in the Toll Road Notes. (Pet. App. 26a). GMD's assets were, in essence, set aside for respondents' benefit. GMD was then ordered to assign those assets to respondents in satis-

[10] Respondents never have contended that the Constitution or a federal statute provides for the injunction here. Nor did the district court rely on the Constitution or a federal statute as the basis for its power to issue the injunction.

faction of the judgment entered in respondents' favor. (J.A. 111). A number of courts have held that "[w]hen faced with motions appearing to call for an attachment but labeled something else, federal courts . . . look past the terminology to the actual nature of the relief requested." *Mitsubishi*, 14 F.3d at 1521, *citing Lechman v. Ashkenazy Enter., Inc.*, 712 F.2d 327, 329-30 (7th Cir. 1983). *See also Rosen*, 21 F.3d at 1530, *citing De Beers*, 325 U.S. at 219 (explaining that "it will be well to note exactly what is the subject of the injunction, since the name given to the process is not determinative."). Here, at the time of its issuance, the "purpose and effect of the injunction [was] to provide security for performance of a future order which may be entered by the court." *De Beers*, 325 U.S. at 219. Accordingly, the "injunction" was simply an attachment by another name.

Permitting the district court to use Fed. R. Civ. P. 65 or its asserted inherent powers to effect what is essentially a prejudgment attachment of assets will enable parties to circumvent the more stringent procedural protections associated with the provisional remedies authorized by Fed. R. Civ. 64. Rule 64 provides a mechanism by which a district court can preserve assets to secure satisfaction of a judgment. Federal district courts should not be authorized to exercise an asserted inherent power to achieve the same result by other means.

II. A FEDERAL DISTRICT COURT SITTING IN DIVERSITY MUST RELY EXCLUSIVELY ON STATE LAW REMEDIES TO PRESERVE A DEFENDANT'S ASSETS TO SECURE A POTENTIAL MONEY JUDGMENT

Even if this Court holds that a federal district court has the inherent power to issue a preliminary injunction restraining a defendant's use of assets to preserve a potential money judgment, such a preliminary injunction may not issue when the district court is exercising diversity jurisdiction and the injunctive relief sought would be unavail-

able under state law.[11] Rather, this Court's *Erie* jurisprudence mandates that a federal district court sitting in diversity must apply state law unless (i) a federal statute or Rule of Civil Procedure controls the issue before the court and that provision represents a valid exercise of Congress' constitutional power or (ii) the application of federal judge-made law does not implicate the concerns of *Erie*—discouraging forum shopping and ensuring equitable administration of the laws.

A. The *Erie* Doctrine

1. *The Statutory Framework*

The issue of the application in the federal district courts of state or federal law has been the subject of much litigation and many decisions by this Court. The analysis necessarily begins with the source of the federal courts' power. It is axiomatic that the federal courts can neither be given nor exercise authority beyond that permitted by the Constitution. *See, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1940). Article III of the Constitution, augmented by the necessary and proper clause of Article I, § 8, cl. 18, gives Congress the power to establish a system of federal district and appellate courts and to promulgate procedural rules governing litigation in those courts. The first Congress exercised this power in enacting the Judiciary Act of 1789. The current version of section 34 of the Judiciary Act, known as the Rules of Decision Act, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

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[11] In *Deckert, De Beers*, and *First Nat'l*, the jurisdiction of the respective district courts was predicated on the existence of a federal question. *See First Nat'l*, 379 U.S. at 380; *De Beers*, 325 U.S. at 215; *Deckert*, 311 U.S. at 285.

62 Stat. 944, 28 U.S.C. § 1652 (1998). Thus, where no provision in the Constitution, a treaty, or a federal statute governs, the federal courts must use rules drawn from state law. Without making any substantive alteration in the Rules of Decision Act a much later Congress enacted the Rules Enabling Act, which gave this Court the

> power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive right.

104 Stat. 5115, 28 U.S.C. § 2072 (1990).

2. *Major Decisions Of This Court*

For almost a century, this Court's analysis of the interplay between state and federal law was predicated on the Court's decision in *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842). In *Swift*, the Court held that federal courts exercising jurisdiction due to diversity of citizenship need not apply the unwritten law of a state as declared by its highest court but rather could use their independent judgment as to what the common law of the state is or should be. *Id.* at 18. The issue in *Swift* was whether a pre-existing debt was adequate consideration for an endorsement of a bill of exchange so as to make the endorsee a holder in due course. Although this Court's prior decisions indicated that under Federal law a pre-existing debt constituted adequate consideration, New York law was unclear. The Court concluded that the New York decisions were not the "laws" of the state within the meaning of the Rules of Decision Act and, accordingly, could be disregarded by the district court sitting in diversity.

Although much criticized, *Swift* survived for nearly a hundred years until the decision in *Erie*, 304 U.S. 64. *Erie* held that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress," federal courts

sitting in diversity should follow the substantive law of the states in which they sit. *Id.* at 78. Strictly procedural issues, however, remain subject to federal law. *See, e.g., Sibbach*, 312 U.S. at 10.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945), this Court recognized that whether a particular issue is substantive as opposed to procedural only begins the inquiry. The Court described the important issue as whether

> a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?

Id. at 109. The Court held that "the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id. See also Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) (holding that the thrust of *Erie* is to ensure "substantial uniformity of predictable outcome" between cases tried in federal and state courts). Thus, the "outcome determinative" test was born.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court first addressed the impact of the Rules Enabling Act on its *Erie* jurisprudence. The Court held that, in a diversity action, Fed. R. Civ. P. 4(d)(1), rather than state law, governed the manner in which process was served. *Id.* at 464. Massachusetts law required in-hand service on the

executor or administrator of an estate, whereas Rule 4 permits service by leaving copies of the summons and complaint at the defendant's home with some person of suitable age and discretion. *Id.* at 461; *see* Fed. R. Civ. P. 4(e)(2). The Court held that when a federal statute or Federal Rule of Civil Procedure conflicts with state law, federal law must be applied unless it violates the terms of the Rules Enabling Act or exceeds a constitutional grant of authority. *Id.* at 464. If the federal law was properly enacted and controls the issue before the court, it prevails over state law and no *Erie* analysis is necessary. *Id.* at 468. It is necessary to employ the "outcome determinative" test of *York* only when there is no "direct collision" between state and federal law. Even then, the court should apply the test with "reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." *Id.* at 468.[12]

B. The Question Whether A District Court Is Empowered To Issue A Preliminary Injunction Must Be Decided Under State Law

1. *No Federal Statute Is Controlling*

The court of appeals did not rely on any federal statute or Federal Rule of Civil Procedure as the basis for the district court's power to issue the preliminary injunction. Nor does any federal law control the issue before the Court. Nothing in the Federal Rules of Civil Procedure mandates that an injunction issue in the circumstances

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12 Subsequent holdings of this Court have indicated that federal law is in conflict with state law only when there is an "unavoidable clash" between the federal rule and the state law. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). *See also S.A. Healy Co. v. Milwaukee Metro. Sewerage*, 60 F.3d 305, 310 (7th Cir.), *cert. denied*, 516 U.S. 1010 (1995) (a state law is in actual conflict with a federal rule when "enforcing the state rule would knock out the federal rule").

present in this case, or under any circumstances.[13] In fact, Fed. R. Civ. P. 65 does not state that injunctive relief is available (let alone required) in any particular case. Rather, it merely dictates the procedural and proof requirements for determining whether a preliminary injunction or restraining order may issue. *See Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988); *see also* 13 J. Moore et al., *Moore's Federal Practice* § 65.07 (3d ed. 1998).

2. *New York Law Does Not Authorize The Remedy Provided By The District Court*

New York has a longstanding tradition of rejecting the use of injunctive relief in actions for money damages. New York's first effort at a general compilation of its rules of civil procedure came in 1848 with the enactment of the Code of Procedure (the "Field Code"). Section 219 of the Field Code states that an injunction may issue:

> Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, . . . consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when during the litigation it shall appear that the defendant is doing, or threatens . . . some act to be done in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted, to restrain such act. And where during the pendency of an action . . . the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

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13 As discussed in Point I. C. *supra*, Fed. R. Civ. P. 64 directs a federal district court to rely on state law provisional remedies.

Code of Procedure § 219 (1849). Although the language of § 219 may be ambiguous, the accompanying notes to § 604 of the Throop Code of Civil Procedure (the "Throop Code") (enacted in 1876 as an extensive codification of the detailed amendments to the Field Code) eliminate any uncertainty. The notes to § 604 were expressly intended to clarify the question of whether, under § 219 of the Field Code, a contract creditor could enjoin a debtor from "disposing of his property, pending an action to establish the debt." Throop Code § 604 (1892). The notes state that this question "would be unequivocally answered in the negative. Apart from the violation of long settled principles, involved in an affirmative answer, the remedy by attachment seems to be ample." *Id.*

The Civil Practice Act (the "C.P.A."), enacted in 1921, replaced the Throop Code. C.P.A. § 878(2) provided that:

> Where it appears that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

The notes to C.P.A. § 878 make clear that such an injunction was only appropriate upon a showing that the plaintiff's underlying cause of action entitled him to equitable relief. Even in equitable actions, however, New York law now rejects the use of a preliminary injunction to restrain a defendant's unrelated assets to preserve a potential judgment. Since the New York State legislature's adoption of the Civil Practice Law and Rules ("C.P.L.R.") and repeal of § 878(2) of the C.P.A.,

> [a]n injunction may no longer be issued on the ground that the defendant merely threatens to dispose of his property not the subject matter of the action, to render himself judgment proof. (CPA § 878(2)). Because an injunction should never issue where there are other adequate remedies and CPLR 6201(3) authorizes an order of attachment in this situation, no hardship will be worked by its omission from the injunction statutes. A preliminary injunction is still unavailable in an action for a sum of money only.

Daley v. Related Companies, Inc., 179 A.2d 55, 60, 581 N.Y.S.2d 758, 761 (1st Dep't 1992), *citing* McLaughlin, J., Practice Commentaries, 7B McKinney's C6301:1 at 209 (1980); *Rosenthal v. Rochester Button Co.*, 148 A.D.2d 375, 377, 539 N.Y.S.2d 11, 13 (1st Dep't 1989).

Under current New York law, a plaintiff seeking a money judgment may obtain an order of attachment when

> the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. . . .

C.P.L.R. § 6201(3) (McKinney 1992). As the court of appeals acknowledged, however, New York law does not provide for the prejudgment attachment of assets, such as the Toll Road Notes, located outside of New York State.[14] (Pet. App. 8a); C.P.L.R. § 6201. Nor does New York law provide for preliminary injunctive relief in an action for money damages. C.P.L.R. § 6301 (McKinney 1962). New York has expressly decided that attachment is the sole mechanism by which a court may prevent a defendant from assigning, secreting, or disposing of assets in an effort to frustrate a potential judgment. In issuing the preliminary injunction, the district court not only contravened current state law but disegarded New York's long standing legal traditions.

---

[14] No state statute purports to authorize the attachment of property outside state boundaries, nor could it constitutionally do so. *See Clark v. Williard*, 294 U.S. 211 (1935); *Fall v. Eastin*, 215 U.S. 1 (1909).

3. *Under* Erie, *The District Court Should Have Relied On New York Law In Determining Whether A Preliminary Injunction Could Issue*

Where, as here, there is a conflict between federal judge-made law and state law, this Court should analyze the conflict with reference to the twin aims of *Erie*. *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). If application of the federal judge-made law would promote forum shopping or the inequitable application of the law, state law should govern. *Id.* at 27 n.6. This Court's most recent decisions support the application of state law to a litigant's request for preliminary injunctive relief in a diversity action.

In *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996), this Court held that a federal district court sitting in diversity in New York was required to apply the New York standard in determining whether a jury award of damages was excessive. *Id.* at 438. C.P.L.R. § 5501(c) dictates that the New York Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." By contrast, the federal courts traditionally have authorized remittitur only "if the jury's verdict was so excessive that it 'shocked the conscience of the court.'" *Id.* at 422, *citing Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1012 (2d Cir. 1995).

Gasperini therefore presented the question whether to apply federal judge-made law or New York State law under *Erie*. Although on its face C.P.L.R. § 5501(c), which provides the standard of review to be employed by the New York Appellate Division in determining whether a damages award is excessive or inadequate, is arguably "procedural," this Court asked whether the application of C.P.L.R. § 5501(c) would be outcome determinative with regard to the twin aims of *Erie*. *Id.* at 428. The Court concluded that "if federal courts ignore the . . . New York standard and persist in applying the

'shock the conscience' test to damage awards on claims governed by New York law, 'substantial variations between state and federal [money judgments]' may be expected." *Id.* at 429-30, *citing Hanna*, 380 U.S. at 467-68. The Court held that "[j]ust as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." *Id.* at 430-31, *quoting Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949).

In this case, the preliminary injunction issued by the district court provided respondents with an advantage that could not have been provided by a New York state court in identical circumstances. Pursuant to the injunction, GMD's Toll Road Notes could be used only to satisfy a money judgment for respondents. Once the injunction was in place, respondents simultaneously moved for summary judgment and the Turnover Order. (J.A. 110-11). If the district court had adhered to New York law, however, the preliminary injunction could not have issued. GMD would have been able to assign its right to receive the Toll Road Notes, GMD's primary asset, to restructure its financial obligations and pay debts owed to third parties. As both the district court and the court of appeals observed, respondents would have been unable to obtain the remedy that they ultimately obtained. Thus, as in *Gasperini*, the district court disregarded state law in preserving a damages remedy that could not have been preserved under state law.

If the decision of the court of appeals is permitted to stand, both policies underlying *Erie* would be frustrated. First, the availability in federal district court of the preliminary injunction issued in this case undoubtedly would promote forum shopping. In any action in which the defendant's ability to pay an ultimate judgment is in question, a plaintiff able to comply with 28 U.S.C. § 1332

will choose to litigate in federal court solely because of the availability of preliminary injunctive relief to restrain a defendant from dissipating its extraterritorial assets. Second, affirmance of the court of appeals' decision would contravene *Erie*'s goal of ensuring equitable administration of the law. A defendant in complete diversity with the plaintiff could be subjected to restraints on its assets that could not be imposed on a New York defendant in an action brought by a New York plaintiff. As this Court has held, "the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *York*, 326 U.S. at 108-09. Forum selection should not be predicated on the nature of the remedies available to secure satisfaction of the judgment ultimately to be entered.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 14, 1999

APPENDIX

APPENDIX

§ 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or

4. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

L.1962, c. 308; amended L.1970, c. 980, § 1; L.1977, c. 860, § 1.

§ 6301. Grounds for preliminary injunction and temporary restraining order

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has de-

manded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

L.1962, c. 308.

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No. 98-231

In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners,

v.

ALLIANCE BOND FUND, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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February 16, 1999

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QUESTION PRESENTED

Whether a federal court has the power to enjoin defendants—over which it has personal jurisdiction and which have no defense on the merits—from dissipating their principal asset and rendering themselves judgment proof during the pendency of the litigation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents' parent corporations are identified and any publicly held company that owns 10% or more of any Respondent's stock is listed in the Rule 29.6 Statement in Respondents' Brief in Opposition to the Petition for a Writ of Certiorari ii-iii.

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STATUTES AND RULES INVOLVED

Pertinent statutory provisions and rules are reprinted in an Appendix to this brief.

STATEMENT

The federal district court temporarily enjoined a foreign debtor from disposing of its principal asset pending the outcome of a civil action brought by investors to collect on notes issued by the debtor and guaranteed by its operating subsidiaries. The district court made findings of fact that the investors were "almost certain" to succeed on the merits; that the debtor was "at risk of insolvency if not already insolvent"; and that the debtor planned "to satisfy its Mexican creditors to the exclusion" of the investors. Pet. App. 25a-26a. The district court concluded: "In light of [the debtor's] financial condition and dissipation of assets, any judgment [the investors] obtain in this action will be frustrated" in the absence of a preliminary injunction. Pet. App. 26a.

The foreign debtor, despite admitting personal jurisdiction, insisted that the district court lacked power to enjoin its dissipation of assets and contended that judgment must be allowed to "follow in the ordinary course." Pet. App. 35a. The district court entered the preliminary injunction and the court of appeals affirmed.

A. GMD's Default On Guaranteed Notes And Its Dissipation Of Assets

Respondent Alliance Bond Fund, Inc., et al. (the "Investors") are investment funds that purchased, out of a $250 million offering, more than $75 million in principal amount of 8.25% notes due 2001 ("Notes") sold by Petitioner Grupo Mexicano de Desarrollo, S.A. ("GMD"), a Mexican conglomerate engaged in the construction business.[1] The Notes are unconditionally guaranteed by GMD's

---

[1] This brief follows the convention of the court of appeals below and refers to the Respondents as the "Investors." Pet. App. 3a. Some of the Respondent investment funds are publicly offered open-end mutual funds with minimum investments of $250. *See* C.A. 13

operating subsidiaries, which are also Petitioners (collectively, the "Guarantors").

1. The Guaranteed Notes.—Although the Notes are unsecured obligations, they rank *pari passu* in priority of payment with all of GMD's other present and future unsecured debt. *See* C.A. 235-36. The Note instrument prohibits GMD from incurring any encumbrance or other lien on any of its assets, whenever acquired, as security for any indebtedness unless GMD secures the Notes equally and ratably with or prior to such indebtedness, with certain exceptions (the "Negative Pledge Covenant"). *See* C.A. 128-29. Interest payments on the Notes were due in February and August of each year. *See* C.A. 235. GMD used a portion of the proceeds from the Notes to repay debts incurred as a result of its participation in the construction of an inter-city toll road system in Mexico. *See* C.A. 38, 56-58.

2. The Failure Of The Mexican Toll Road Program And GMD's Default On The Notes.—From 1990 to 1994, GMD participated in the Mexican government's program to build an inter-city toll road system. As a result of economic uncertainty, currency devaluation, and other difficulties, the toll road program was a financial failure. *See* C.A. 236.

For its part, GMD suffered substantial losses when its invoices for work in building the toll roads (the "Toll Road Receivables") were not paid. *See* C.A. 264. In its Annual Report filed with the Securities and Exchange Commission for the 1996 fiscal year, GMD reported that its liabilities exceeded its assets and its independent auditors expressed "substantial doubt" that the company could continue as a going concern. *See* C.A. 222-23.

In August 1997, GMD defaulted on the interest payment then due on the Notes and the Guarantors defaulted on their obligations. *See* C.A. 4. Two months after its

(the confidential joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of the Court).

default, on October 28, 1997, GMD issued a press release in which it reported revenues of approximately $119 million, a net loss of approximately $802 million through the third quarter of 1997, and a negative net worth of $214 million. *See* C.A. 214.

3. The Mexican Toll Road Rescue Program.—In response to the precarious financial situation facing the participants in the toll road program—including GMD—the Mexican government initiated a Toll Road Rescue Program. Under that program, the Mexican government promised to issue government-guaranteed notes ("Government Notes") that could be exchanged for Toll Road Receivables held by companies such as GMD. In return for the Government Notes, the Mexican government would assume control of the toll roads.

In October 1997, GMD publicly disclosed that it expected to receive at least $309 million in Government Notes in exchange for its Toll Road Receivables. *See* C.A. 265. According to GMD, the Government Notes are its "primary" asset. *See* C.A. 213, 220; Pet. Br. 2.

4. GMD's Assignment Of Government Notes To Mexican Creditors.—Despite the Negative Pledge Covenant and the *pari passu* status of the Notes, GMD publicly reported that it had pledged $117 million in Government Notes to satisfy various of its Mexican creditors. *See* C.A. 266-67. Because GMD did not possess Government Notes at the time of those pledges, it "irrevocably" assigned or placed in "trust" Tool Road Receivables that its Mexican creditors could later exchange for Government Notes. *See* C.A. 266-67.

B. The District Court's Entry Of A Preliminary Injunction To Preserve The *Status Quo* And Its Ability To Enter Effectual Relief

As a result of GMD's default on the August 1997 interest payment, the Investors accelerated the principal on their Notes. *See* J.A. 56-66. On December 12, 1997, they commenced an action for breach of contract. *See* J.A. 22-32. Because GMD had already pledged some of

the Government Notes to various of its Mexican creditors, the Investors moved for a temporary restraining order and a preliminary injunction to enjoin GMD from pledging or otherwise transferring its remaining interests in Government Notes, in order to maintain the *status quo* and preserve their damages remedy. *See* Pet. App. 22a-27a; J.A. 21-32. The Investors also moved for an order that GMD deposit the Government Notes, when issued, into a trust to be established under Mexican law. *See* J.A. 31. On December 12, 1997, the district court granted the Investors' motion for a temporary restraining order. *See* Pet. App. 56a. At the same time, it scheduled a hearing the following week on the Investors' motion for a preliminary injunction and their request for a trust. *See* Pet. App. 56a-57a.

1. The Hearings On The Investors' Motion For A Preliminary Injunction.—At the December 19, 1997 hearing on the preliminary injunction, GMD admitted that it was subject to personal jurisdiction in the district court and it did not challenge its liability on the Notes. *See* Pet. App. 33a.[2]

What is more, GMD disclosed for the first time that it had pledged between $214 and $258 million of Government Notes to its Mexican creditors—a fact that contradicted GMD's prior public disclosures and the sworn affidavit of its legal representative to the district court that it had pledged only $117 million of Government Notes. *See* C.A. 285-87; Pet. App. 40a. GMD also acknowledged its plan to pledge additional Government Notes to its Mexican creditors—a plan which would have left only $5.5 million of the original $309 million in Government Notes to satisfy the $75 million plus interest owed to the Investors. *See* C.A. 10, 228.

In light of those revelations, the district court asked: "why should I delay entry of that judgment simply because

[2] GMD and the Guarantors consented in the Note instrument and guarantee, respectively, to personal jurisdiction in any federal or state court in New York. *See* C.A. 135, 147.

the debtor is going to try to use the process of the court to delay entry of a judgment as to which there is no defense?" Pet. App. 36a. Following the hearing, the district court extended the temporary restraining order by consent of the parties to December 23, 1997, and asked the parties to draft a preliminary injunction to "preserve the issue status quo." Pet. App. 53a-54a.

After a hearing on December 23, 1997, the district court preliminarily enjoined GMD from further dissipating, transferring, or otherwise encumbering its interests in the Government Notes. *See* Pet. App. 26a. The district court found that the probability that the Investors would succeed on the merits was "almost certain." *Id.* In addition, the district court found that the Investors would be irreparably harmed absent a preliminary injunction and had no adequate remedy at law. *See id.* In support of that finding, the district court found that GMD had "a negative net worth of approximately $214 million" and "is at risk of insolvency if not already insolvent." Pet. App. 25a. The district court further found that GMD planned to use the Government Notes, which represented "72 percent" of its total current assets, "to satisfy its Mexican creditors to the exclusion of" the Investors and other holders of the Notes and had already encumbered certain Toll Road assets. Pet. App. 25a-26a. "In light of [GMD's] financial condition and dissipation of assets," the district court concluded that "any judgment [the Investors] obtain in this action will be frustrated" absent a preliminary injunction. Pet. App. 26a. Later that same day, the district court set a bond of $50,000 in accordance with Federal Rule of Civil Procedure 65(c). *See* Pet. App. 28a.

At no time did GMD contend that the district court was bound by the Rules of Decision Act, 28 U.S.C. § 1652 (1994), or this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), to apply New York law to decide the Investors' motion for a preliminary injunction.

2. The Preliminary Injunction.—In accordance with Federal Rule of Civil Pr cedure 65(d), the district court crafted the preliminary injunction to bind only GMD, the

Guarantors, their representatives, and persons in active concert or participation with them. *See* Pet. App. 26a. The preliminary injunction gave the Investors no lien or other security interest in the Government Notes. *See id.* It gave the Investors no preference over GMD's other creditors. *See* Pet. App. 26a, 31a. And it provided expressly for the possibility that GMD might commence a proceeding under the insolvency or bankruptcy laws of Mexico or the United States:

> It is FURTHER ORDERED that nothing contained herein shall prohibit [GMD] from commencing any insolvency proceedings under any applicable law.

Pet. App. 27a; *see* J.A. 75, 77.

The preliminary injunction fashioned by the district court likewise had no effect on the rights of any existing assignees of GMD's Toll Road Receivables, including the Mexican government and its social security agency. Instead, the preliminary injunction applied prospectively to enjoin assignments of additional Toll Road Receivables or Government Notes by GMD. *See* Pet. App. 26a. Even as to prospective assignments, the district court expressly allowed for modification of the preliminary injunction upon application by GMD. *See* Pet. App. 51a, 53a; J.A. 78. Indeed, on February 5, 1998, GMD applied to the district court for release of some $7 million in Toll Road Receivables or Government Notes from the preliminary injunction. *See* J.A. 6. GMD, however, withdrew its motion. *See* J.A. 8.

Consistent with its sensitivity to the extraterritorial effect of its order, the district court denied the Investors' request for imposition of a Mexican trust over the Government Notes pending final judgment. *See* Pet. App. 26a-27a, 51a. The district court explained that it was not inclined "to start running things in Mexico" and observed that other interested parties were not before it. Pet. App. 30a, 37a-39a.

C. The Court Of Appeals' Decision On The Interlocutory Appeal From The Order Granting The Preliminary Injunction

On interlocutory appeal from the district court's order granting the preliminary injunction, GMD did not dispute the district court's findings of irreparable injury and likelihood of success on the merits. *See* GMD Br. 7. Instead, GMD contended that the district court had no power to issue a preliminary injunction under Federal Rule of Civil Procedure 65. *See* Pet. App. 6a ("GMD believes that Fed. R. Civ. P. 64 is the only procedural mechanism to prevent a litigant from concealing or transferring assets in order to frustrate a potential judgment."). The court of appeals rejected GMD's contention and affirmed the district court's order granting the preliminary injunction.

The court of appeals held that Rules 64 and 65 of the Federal Rules of Civil Procedure are not mutually exclusive. Notwithstanding the unavailability of relief under Rule 64, the court of appeals reasoned that the district court—because it had personal jurisdiction over GMD—had equitable power pursuant to Rule 65 to restrain GMD from dissipating its assets, even if those assets were located outside the district in which the court sat. *See* Pet. App. 6a-9a. In holding that the district court had power to grant the preliminary injunction, the court of appeals examined the decisions of this Court, the holdings of other courts of appeals, and its own decisions—including decisions expressing "great reluctance" to issue injunctions prohibiting conduct outside the district in which the court sits. Pet. App. 7a-8a.

The court of appeals concluded that, in the extraordinary situation, as here, where a defendant either is insolvent or is dissipating assets in frustration of a plaintiff's anticipated judgment, Rule 65 authorizes a district court temporarily to enjoin the defendant to maintain the *status quo* and protect the plaintiff's damages remedy. *See* Pet. App. 9a-18a. In reaching that conclusion, the court of appeals recognized that GMD's dissipation of Government Notes was an attempt to frustrate the Investors' eventual

judgment, rather than an effort legitimately to reduce GMD's debt and pay off creditors. Specfically, the court of appeals stated that the "plain import of [the district court's] findings is that the actions of GMD were less than benign." Pet. App. 17a. The court of appeals also held that the district court's finding that GMD planned to use the Government Notes to satisfy Mexican creditors to the exclusion of the Investors and other holders of the Notes "was adequately supported" in the record and stated that "GMD's duplicity in disclosing the full extent of its assignment [of its interests in the Government Notes] further support[ed] this conclusion." Pet. App. 17a-18a.

On appeal, GMD did not contend that the district court's order was contrary to the Rules of Decision Act, 28 U.S.C. § 1652, or this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64.

D. Subsequent Proceedings In The District Court And Court Of Appeals

On January 8, 1998, after it had filed its interlocutory appeal, GMD answered the Investors' complaint and asserted four counterclaims seeking damages of at least $153 million for alleged "wrongful interference" by the Investors with GMD's efforts to restructure its financial operations. J.A. 83-91. On February 19, 1998, the Investors moved to dismiss the counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6) and for summary judgment on their breach-of-contract claim. *See* J.A. 110. GMD submitted no opposition to the motion to dismiss and did not contest the award of money damages. *See* J.A. 111.

On April 17, 1998, the district court entered final judgment in favor of the Investors and against GMD in the amount of $82,444,259 and entered an order dismissing the counterclaims with prejudice. *See* Pet. App. 58a-59a; J.A. 110-12. In both the judgment and order, the district court converted the preliminary injunction into a permanent injunction pending satisfaction of the award of money damages. *See* Pet. App. 59a; J.A. 112.

On April 20, 1998, GMD filed a notice of appeal from "so much" of each of the district court's April 17, 1998 judgment and order that (1) required GMD to turn over to the Investors Toll Road Receivables or Government Notes in an amount sufficient to "satisfy the Judgment" (the "Turnover Order"); and (2) "convert[ed]" the preliminary injunction into a permanent injunction. J.A. 113-14. In its opening brief in the court of appeals, however, GMD abandoned its appeal from the conversion of the preliminary injunction into a permanent injunction:

> GMD has decided not to appeal that portion of the Order converting the preliminary injunction into a permanent injunction.

Brief of Defendants-Appellants in No. 98-7549, *Alliance Bond Fund, Inc. et al. v. Grupo Mexicano de Desarrollo, S.A.* (2d Cir. July 1, 1998), at 7 n.3.

On May 1, 1998, the court of appeals stayed the Turnover Order pending GMD's appeal, but the permanent injunction is "unaffected" and "remains effective." J.A. 115-16. On December 10, 1998, the court of appeals heard oral argument on the appeal, which is currently pending before that court.

SUMMARY OF ARGUMENT

I. This interlocutory appeal is moot. In the court of appeals below, GMD contended that the district court lacked power to enter the preliminary injunction restraining it from dissipating its assets pending the outcome of the litigation. While the interlocutory appeal was pending, the district court entered a permanent injunction into which the preliminary injunction merged. As a consequence, the preliminary injunction no longer exists and there is no live case or controversy regarding the district court's power to enter it.

Contrary to GMD's contention, a claim for damages for being wrongfully enjoined does not save an interlocutory appeal from mootness. In *University of Texas v. Camenisch*, 451 U.S. 390 (1981), this Court held that although a damages claim prevents the *case* from becom-

ing moot, it does not save the *interlocutory appeal* from becoming moot. An interlocutory appeal—which is a narrow exception to the strong federal policy against piecemeal review—presents the question whether the district court had discretion to enter the preliminary injunction and properly exercised that discretion. It does not present the question whether the injunction defendant is entitled to damages. That question arises, and GMD's damages claim would have accrued, only if (and after) it had prevailed on the merits and all subsequent appeals.

In this case GMD has no damages claim for being wrongfully enjoined because it lost on the merits and voluntarily abandoned its appeal from the permanent injunction. By acquiescing in the district court's exercise of the very power it challenges on this interlocutory appeal, GMD forfeited any claim that it was wrongfully enjoined. Accordingly, the appeal is moot and the petition for a writ of certiorari should be dismissed.

II. If the Court determines that it may reach the merits, it should affirm. The district court had personal jurisdiction over the parties and had power to issue a preliminary injunction against GMD to restrain it from dissipating its principal asset pending the outcome of the litigation, in order to preserve the *status quo* and protect its ability to render an effectual judgment. This Court's decisions in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), and *United States v. First National City Bank*, 379 U.S. 378 (1965), support the district court's preliminary injunction in principle, and its decision in *De Beers Consolidated Mines v. United States*, 325 U.S. 212 (1945), is entirely consistent with it.

Even if the district court's power to enjoin temporarily the dissipation of assets presented a question of first impression in this Court (which it does not), the order granting the preliminary injunction should nonetheless be affirmed. This Court has consistently held that federal equity power is flexible and adaptable to new situations. Although GMD contends that federal equity power is confined to circumstances in which there exists a "traditional predicate" for its use, the cases on which it relies for that proposition concern not equitable power, but inherent power. The concern posed by inherent power—*i.e.*, the lack of democratic sanction—has no resonance with equitable power, which Congress gave the federal courts beginning with the Judiciary Act of 1789.

Nor does Federal Rule of Civil Procedure 64, which incorporates state prejudgment attachment law, impliedly limit federal courts' power to issue preliminary injunctions under Federal Rule of Civil Procedure 65. The equitable power of federal courts incorporated in Rule 65 is not subject to limitation absent a "clear statement," which Rule 64 plainly is not. Moreover, the issuance of preliminary injunctions under Rule 65 cannot circumvent Rule 64 because the separate origins of the two rules demonstrate that they operate independently of each other.

III. GMD's attempt to avoid federal law—by contending that the Rules of Decision Act, 28 U.S.C. § 1652, and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, require the application of New York law—is not properly before this Court and is without merit. The *Erie* issue is neither fairly included in the question presented nor pressed or passed on by any of the courts below. Even if it were, and state law governed the issuance of injunctions by federal courts in diversity cases, the preliminary injunction entered in this case is consistent with New York law and this Court would have no occasion to address the *Erie* issue.

In any event, federal law governs the issuance of preliminary injunctions in federal court. Under this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965), state law does not govern the issuance of injunctions by federal courts because Rule 65 governs that procedure. In the alternative, even if federal law conflicted with state law, the federal interest in having uniform equitable remedies and entering effectual judgments outweighs the state interest in discouraging forum shopping between state and federal courts.

ARGUMENT

I. THIS INTERLOCUTORY APPEAL HAS BEEN RENDERED MOOT BY THE CONVERSION OF THE PRELIMINARY INJUNCTION INTO A PERMANENT INJUNCTION FROM WHICH GMD HAS NOT PROSECUTED AN APPEAL

GMD appealed from the district court's entry of the preliminary injunction. While that appeal was pending in the court of appeals, however, the district court entered a final judgment that, among other things, converted the preliminary injunction into a permanent injunction. As a consequence of that final judgment, the preliminary injunction merged into the final decree and ceased to exist. Accordingly, this interlocutory appeal from the order granting the preliminary injunction is moot.[3]

Contrary to GMD's contention (Pet. 10), its hypothetical claim against the $50,000 preliminary injunction bond (J.A. 80) does not present a live case or controversy on this interlocutory appeal, for two independent reasons. To begin with, the only issue on this interlocutory appeal is the propriety of the preliminary injunction, which has ceased to exist. GMD's hypothetical damages claim (if preserved) would have had to await final judgment and the completion of all subsequent appeals. Thus, even if GMD had a damages claim that prevented the *case* from becoming moot, it would not have saved this *interlocutory appeal* from becoming moot.

In any event, GMD has forfeited even a hypothetical claim for damages caused by the preliminary injunction because it acquiesced in the permanent injunction in the

[3] The Investors pointed out the inconsistency between GMD's petition to this Court and its failure to prosecute an appeal from the permanent injunction in their brief in opposition. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari 4 n.3. Even if the Investors had not raised mootness in their brief in opposition, mootness may be raised for the first time in the briefs on the merits and cannot be waived, because it deprives the Court of a live case or controversy as required by Article III. *See, e.g., North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

court below. GMD would have had a hypothetical damages claim only if it had prevailed on the merits. It did not. *See* J.A. 110-12. Although GMD noticed an appeal from that portion of the final judgment granting a permanent injunction, *see* J.A. 113, it abandoned that appeal in the court below, *see supra* p. 9. As a consequence, GMD has abandoned any possible claim for damages caused by the issuance of injunctive relief.

A. This Interlocutory Appeal Is Moot Because The Preliminary Injunction Has Been Converted Into A Permanent Injunction And No Longer Exists

It is black-letter law that an interlocutory appeal from an order granting a preliminary injunction is moot if the preliminary injunction is made permanent:

> A preliminary injunction, if granted, lasts only until a final decree is entered; it is merged in and does not survive the entry of a final decree. If, therefore, an appeal is taken from an order granting or denying a temporary injunction, and before the appeal is heard a final decree is entered by the trial court, the appeal will be dismissed as moot. More obviously, where an appeal is taken from an order granting or denying a temporary injunction, and before the appeal is heard a final judgment is entered and an appeal is taken from the final judgment, the appeal from the interlocutory order will be dismissed.

42 AM. JUR. 2D *Injunctions* § 355, at 1166-67 (1969) (footnotes omitted).

Consistent with that rule, this Court has consistently dismissed interlocutory appeals from orders granting preliminary injunctions if a permanent injunction is entered. *See Sterling v. Constantin*, 287 U.S. 378, 386 (1932); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 588-89 (1926).[4]

[4] *See also Champlin Ref. Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 224 (1932) (dismissing interlocutory appeal of order denying preliminary injunction); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 205-06 (1924) (same); *Home Tel. & Tel. Co. v.*

The preliminary injunction that GMD challenges on this interlocutory appeal ceased to exist when, on April 17, 1998, the district court converted the preliminary injunction into a permanent one. *See* Pet. App. 59a; J.A. 112. At that time, the preliminary injunction became *functus officio* ("a task performed," BLACK'S LAW DICTIONARY 673 (6th ed. 1990)) and this interlocutory appeal became moot. *See* 42 AM. JUR. 2D *Injunctions* § 317, at 117-18 ("When the final decree is granted, the provisions of the temporary injunction become functus officio, or are merged in it or dissolved thereby, and no formal order of dissolution is necessary to the validity and effectiveness of the decree." (footnotes omitted)). Because the preliminary injunction no longer exists, it follows that this interlocutory appeal from the order granting that injunction is moot.

B. GMD's Hypothetical Damages Claim For Being Wrongfully Enjoined Does Not Save This Interlocutory Appeal From Mootness

To be sure, a party found to have been wrongfully enjoined has a claim against the injunction bond for damages proximately caused by the preliminary injunction and that claim prevents the *case* from becoming moot. But that hypothetical claim is not at issue in an interlocutory appeal from an order granting a preliminary injunction and it does not save the *interlocutory appeal* from becoming moot. To the contrary, that damages claim must await the trial on the merits and all subsequent appeals therefrom. It would come before this Court, if at all, only on appeal from a final judgment, at which time this Court would have the benefit of a fully developed factual record and an opinion of the court of appeals on that record. In this case, GMD has forfeited even that hypothetical claim by abandoning its appeal of the permanent injunction. Because GMD has acquiesced in the district court's power to restrain its

Kuykendall, 285 U.S. 206, 208-09 (1924) (same); *Shaffer v. Carter*, 252 U.S. 37, 44 (1920) (same).

dissipation of assets, for purposes of the permanent injunction, it may not challenge that power on interlocutory appeal from the preliminary injunction.

1. *GMD's Hypothetical Damages Claim Is Not Presented On This Interlocutory Appeal From The Order Granting The Preliminary Injunction*

Damages from being wrongfully enjoined are not presented on an interlocutory appeal from an order granting a preliminary injunction. An interlocutory appeal from an order granting a preliminary injunction is authorized by 28 U.S.C. § 1292(a)(1) (1993), which is an exception to the general federal policy "against piecemeal appeals." *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966); *see also* GMD C.A. Br. 4 (resting interlocutory appeal in this case on § 1292(a)(1)). The purpose of § 1292(a)(1) is to permit litigants "to effectually challenge interlocutory orders of serious, perhaps irreparable consequences." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955). An interlocutory appeal from an order granting a preliminary injunction thus presents the narrow question whether the district court had the discretion to issue the injunction and properly exercised that discretion.[5]

By contrast to the narrow question presented on interlocutory appeal from an order granting a preliminary injunction, a claim for damages arising out of being wrongfully enjoined necessarily accrues only *after* the defendant prevails at the trial on the merits and all subsequent appeals therefrom. Federal Rule of Civil Procedure 65(c) requires security for a preliminary injunction "for the

[5] *See, e.g., Synanon Found., Inc. v. California*, 444 U.S. 1307, 1307 (1979) (Rehnquist, J., Circuit Justice) ("preliminary injunction should be reversed by this Court . . . only when the judge's 'discretion was improvidently exercised.'" (*quoting Alabama v. United States*, 279 U.S. 229, 231 (1929)); *Brown v. Chote*, 411 U.S. 452, 457 (1973) ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion.").

payment of such costs and damages as may be incurred or suffered by any party who is *found to have been wrongfully enjoined* or restrained" (emphasis added). A defendant can be "found to have been wrongfully enjoined" only after a trial on the merits resulting in a judgment in favor of the enjoined party and affirmance on appeal.[6] Withholding recovery until a final merits determination is not only the rule, it is right. If a plaintiff obtains a permanent injunction after a full trial on the merits and further prevails on all appeals, then the defendant was not "wrongfully enjoined" by the preliminary injunction.[7] Regardless of whether the district court correctly predicted which party would succeed on the merits, plaintiff in fact succeeded and the final decree retroactively validates the anticipatory relief.[8]

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[6] Although this Court has not construed Rule 65(c), the lower courts that have construed that Rule hold that a party is "wrongfully enjoined" only if it is ultimately determined that it had the right at all times to do what it was enjoined from doing. *See, e.g., Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990); *see also* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2972, at 458 (2d ed. 1995) ("The motion [to proceed against the surety on an injunction bond] will not precede the final determination on the merits." (footnotes omitted)).

[7] *See, e.g.*, Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828, 839 (1986) ("If the court determines on the merits of the case that the defendant did not have a right to engage in the activity, a procedural error in granting the injunction is irrelevant; the defendant was not unjustly or 'wrongfully' damaged by being deprived of the ability to cause illegal injury to the plaintiff."); *id.* at 837-38; Note, *Interlocutory Injunctions and the Injunction Bond*, 73 HARV. L. REV. 333, 336 (1959) ("If the interlocutory injunction is ultimately made permanent, the anticipatory remedy amounts to a retroactive effectuation of the plaintiffs' right."); *id.* at 340.

[8] *See* 43A C.J.S. *Injunctions* § 319, at 704-05 (1978) ("[L]iability on the bond is not incurred if the cause in which the bond was issued terminated adversely to defendant therein and a final decision was rendered that the injunction was rightfully issued. This is so, although the temporary injunction was vacated, dissolved, dismissed, or discharged."); *id.* § 316, at 701, § 320, at 706-07.

In accordance with the foregoing reasoning, this Court held in *University of Texas v. Camenisch*, 451 U.S. 390, that an interlocutory appeal taken from an expired preliminary injunction is moot—even if the question of damages persists. In *Camenisch*, a deaf graduate student had filed suit to force a state university to pay for a sign-language interpreter to enable him to pursue a masters degree. *See id.* at 391-92. The district court granted a preliminary injunction that required the university to provide the interpreter and the student posted a $3,000 bond. *See id.* at 392. During the university's interlocutory appeal, the student graduated and the preliminary injunction expired. *See id.* at 393. This Court held that, although the *case* was not moot (because a live controversy remained over whether the university must pay for the interpreter), the *interlocutory appeal* from the order granting the preliminary injunction had become moot. This Court explained that distinction at length (*id.* at 393-94 (internal quotations and citations omitted)): and concluded (*id.* at 393-94 (internal quotations and citations omitted)): "This, then, is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot."

This Court specifically rejected the university's argument —echoed by GMD here—that "[t]he determination of whether [GMD] suffered damages requires first that this Court determine whether the injunction was improperly granted." Pet. 10; *see* GMD Br. 7. Contrary to GMD's contention, "when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits." 451 U.S. at 396. This Court explained:

> [L]iability on the injunction bond could not arise until there was a final judgment in favor of the defendant. "This rule is consistent with the policy considerations behind the injunction bond. The requirement of security is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers."

Id. at 397 (quoting *American Bible Society v. Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971)). Thus, this Court would address any issue preserved by the injunction bond "on appeal of the correctness of the trial court's decision on the merits." 451 U.S. at 396.

The only authority GMD offers (GMD Br. 7; Pet. 10) in support of its contention that this interlocutory appeal is *not* moot—the decision of the Second Circuit in *H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17-18 (2d Cir. 1963)—does not even mention mootness. To the contrary, that decision held only that the preliminary injunction at issue in that case had been "improvidently issued." *Id.* at 17. What is more, the Second Circuit's statement in that case that "substantial expenses in transportation and perhaps in fabrication have *already* been incurred" suggests that some other expenses had not yet been incurred and that the controversy over the preliminary injunction was not moot. *Id.* (emphasis added).[9]

[9] In the court below, GMD also cited the Second Circuit's decision in *Meyers v. Jay St. Connecting R.R.*, 288 F.2d 356, 359 (2d Cir. 1961). In a three-sentence summary order that relied solely on *Meyers*, the court of appeals below rejected the Investors' suggestion of mootness. *See* J.A. 118. Depending on which appeal that order addresses, the summary order is either mistaken (if addressed to the interlocutory appeal) or correct (if addressed to the appeal from the final judgment).

On the one hand, if the summary order addresses the mootness of this interlocutory appeal—as did both the Investors' suggestion of mootness and GMD's opposition—then it is mistaken. *Meyers* holds only that expiration of a *permanent* injunction does not moot an appeal if the defendants have a claim against the injunction bond. *See* 288 F.2d at 357-59 & n.2.

On the other hand, if the summary order addresses the mootness of the appeal from the final judgment, it was correct at the time it was made because GMD had noticed an appeal from the permanent injunction (*see* J.A. 113) and thus had a live claim against the injunction bond. The procedural history of the Investors' mootness suggestion is necessary to understand what occurred in the court below. On April 17, 1998, the Investors suggested that the interlocutory appeal from the preliminary injunction (Second Circuit Docket No. 97-9610) had been rendered moot by the district court's final judgment. *See* J.A. 108. On April 20, 1998, after the Investors had filed their suggestion of mootness, but before the court of appeals had ruled on it, GMD appealed two portions of that final judgment—the Turnover Order and the permanent injunction—which were assigned Second Circuit Docket No. 98-7549. *See* J.A. 113-14. On May 4, 1998, two days before it was to issue its opinion on the interlocutory appeal (No. 97-9610), the court of appeals issued its summary order that rejected the suggestion of mootness. That order, however, bore the docket number of the appeal from the final judgment (No. 98-7549), not from the interlocutory appeal (No. 97-9610). *See* J.A. 117-18. Reading the summary order to apply to the appeal from the final judgment is consistent not only with the docket number on that order, but also with the Second Circuit's citation of *Meyers*, which (as noted above), concerns mootness of an appeal from a permanent injunction, not an interlocutory appeal from a preliminary injunction. *See* 288 F.2d at 357-59 & n.2.

Although it is not a part of the record in this case, the parties brought the possible clerical error to the attention of one of the Second Circuit's staff counsel, but the Second Circuit did not change the docket number on its summary order.

2. *GMD's Failure To Prosecute Its Appeal From The Permanent Injunction Forecloses Its Claim For Damages From Being Wrongfully Enjoined*

GMD abandoned any claim it might have had for damages from being "wrongfully enjoined" when it failed to prosecute its appeal from that portion of the final

judgment that converted the preliminary injunction into a permanent injunction.

It is firmly settled that a defendant may be "found to have been wrongfully enjoined" and entitled to damages against an injunction bond only if it prevails on the merits and all subsequent appeals therefrom. *See* authorities cited *supra* p. 6 & nn. 6-8. GMD lost on the merits, however, and the district court entered a final judgment "convert[ing]" the preliminary injunction into a permanent injunction. Pet. App. 59a; J.A. 112. Although GMD noticed an appeal (among other things) from "[s]o much" of the district court's order and judgment "converting" the preliminary injunction "into a permanent injunction," J.A. 113, it abandoned that part of its appeal in its opening brief in the court of appeals below: "GMD has decided not to appeal that portion of the Order converting the preliminary injunction into a permanent injunction." Brief of Defendants-Appellants in No. 98-7549, *Alliance Bond Fund, Inc. et al. v. Grupo Mexicano de Desarrollo, S.A.* (2d Cir. July 1, 1998), at 7 n.3. By abandoning its appeal of the permanent injunction, GMD necessarily forfeited any claim that it had been "wrongfully enjoined" within the meaning of Federal Rule of Civil Procedure 65(c). Hence, any issue that would otherwise have been preserved by the injunction bond is moot. The mootness of this interlocutory appeal thus follows *a fortiori* from *Camenisch*.[10]

II. FEDERAL EQUITY POWER AUTHORIZED THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT

This case exemplifies the proper exercise of federal equity power. The district court had personal jurisdiction over all the parties and thus plainly had power to issue a preliminary injunction "to preserve the relative positions

[10] GMD's voluntary abandonment of its appeal means that the proper disposition is to dismiss the case as moot. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994).

of the parties until a trial on the merits c[ould] be held." *Camenisch*, 451 U.S. at 395. In the situation that faced the court, plaintiffs had a just debt; defendants had no defense on the merits; and defendants would have used the delay inherent in the judicial process to dissipate their principal asset and render the judgment that would inevitably issue uncollectible. *See* Pet. App. 17a-18a, 26a. In response to that situation, the district court fashioned a narrowly drawn preliminary injunction that temporarily enjoined defendants from dissipating what remained of their principal asset, but neither disturbed prior assignments nor prevented the defendants from commencing insolvency proceedings to resolve their financial difficulties. *See supra* p. 6. The district court did enough to preserve the *status quo* and its ability to enter an effectual judgment ,but no more. Among other things, it refused to place GMD's assets in trust under Mexican law pending the outcome of the case. *See supra* p. 6.[11]

Notwithstanding the district court's measured exercise of its equitable power, GMD contends (GMD Br. 10 (emphasis added)) that federal courts may "*never* . . . issue a preliminary injunction to preserve assets to satisfy a potential money judgment." If accepted, GMD's contention would render federal courts "powerless to protect a potential future damages remedy against a recalcitrant defendant with highly liquid assets, no matter how wrongful its conduct, how bad the injury it caused, or how brazen its attempt to evade judgment by secreting assets."

[11] The district court also declined to disturb any past assignments of assets, which included assignments to the Mexican government and its social security agency, and authorized GMD to invoke the bankruptcy laws of Mexico. *See supra* p. 6. The court of appeals was similarly sensitive to the extraterritorial effect of the preliminary injunction and emphasized that such power must be "exercised with great reluctance." Pet. App. 8a. Consequently, *amicus curiae* the Dominican Republic's contention (Br. 15-16) that the lower courts' decisions were not informed by a concern for principles of comity is belied by the record.

Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 194 (3d Cir. 1990).[12] No decision of this Court or principle of equity requires this Court to acquiesce in a defendant's use of the delays inherent in the judicial process to dissipate its principal asset and avoid a just debt.

Contrary to GMD's contention (GMD Br. 10-18), federal courts have broad equity power to enjoin the dissipation of assets pending the outcome of litigation in order to preserve the *status quo* and protect the court's ability to enter an effectual judgment. Although this Court has never had occasion to pass on the precise preliminary injunction entered by the district court below, *Deckert v. Independence Shares Corp.*, 311 U.S. 282, and *United tSates v. First National City Bank*, 379 U.S. 378, support the district court's order in principle. It is only an incremental and logical step from the Court's holdings in those cases to an affirmance of the preliminary injunction at issue in this case.

A. Federal Courts Have Broad Equitable Power To Enjoin Temporarily The Use Of Assets To Maintain The *Status Quo* And Protect Their Ability To Render Effectual Judgments

The Court's decisions in *Deckert* and *First National City Bank* support the district court's preliminary injunction in principle and its decision in *De Beers Consol. Mines v. United States*, 325 U.S. 212, is entirely consistent with it.

1. *Deckert v. Independence Shares Corporation*

In *Deckert*, this Court held that the district court had power to issue a preliminary injunction against the dissipation of assets by a defendant which was "insolvent and its assets in danger of dissipation or depletion," for the

[12] The court of appeals here observed that "[t]he plain import of [the district court's] findings is that the actions of GMD were less than benign." Pet. App. 17a. Those findings established that GMD "was improperly establishing a priority of creditors." *Id.* "GMD's duplicity in disclosing the full extent of its assignments [of Toll Road Receivables] fully supports this conclusion." *Id.*

purpose of "preserv[ing] the status quo pending final determination of the questions raised by the bill." 311 U.S. at 290. *Deckert* was a suit in equity under the federal securities laws to rescind a securities contract allegedly induced by fraud and for restitution of the consideration paid. *See id.* at 288-89. In light of the defendant's insolvency and the danger of dissipation of its assets, this Court unanimously affirmed the district court's order granting a preliminary injunction to restrain a third-party trustee from transferring funds to the defendant or otherwise dissipating the funds:

> "It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." As already stated, there were allegations that Independence was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate.

Id. at 290 (citations omitted) (quoting *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923), and *Meccano, Ltd. v. Wanamaker*, 253 U.S. 136, 141 (1920)).

Contrary to GMD's contention (GMD Br. 11), *Deckert* does not "stand[] for the proposition that a preliminary equitable remedy will issue to preserve a final equitable remedy of restitution or constructive trust when the plaintiff has an equitable claim to a specific *res* or thing in the possession of the defendant." To be sure, Deckert and his co-plaintiffs proceeded by a bill in equity. *See* 311 U.S. at 284. But that procedural posture formed no part of this Court's *ratio decidendi*. To the contrary, this Court in *Deckert* held that the plaintiffs in Securities Act cases, such as the one before it, could proceed by action at law *or* suit in equity: "[T]he [Securities] Act as a whole indi-

cates an intention to establish a statutory right which the litigant may enforce in designated courts by such *legal or equitable* actions or procedures as would normally be available to him." *Id.* at 287-88 (emphasis added). After noting that the jurisdictional grant in the Securities Act includes "suits in equity and actions at law" (*id.* at 288), the Court explained—without drawing a distinction between law and equity—that the right of recovery implies the availability of procedures to effectuate that recovery (*id.* (emphasis added)):

> The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize *any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.*

GMD's attempt to limit *Deckert* to suits in equity is entirely contrived and finds no basis in the reasoning of this Court.

2. *United States v. First National City Bank*

As in *Deckert*, this Court in *First National City Bank* held that a district court with personal jurisdiction over the defendant has power to enjoin the transfer of assets by that defendant in order to preserve the *status quo* and protect against the further dissipation of assets. *See* 379 U.S. at 385. In *First National City Bank*, the United States brought an action to foreclose a tax lien on the property of a Uruguayan corporation, including bank accounts held in First National City Bank's foreign branches. *See id.* at 379-80. "[A]ffidavits filed with the complaint averred that [the Uruguayan corporation] was removing its assets from the United States." *Id.* at 380. On that basis, the district court granted the government's motion for a preliminary injunction and temporarily enjoined First National City Bank from transferring any property or rights to property of the Uruguayan corporation whether "within or without the United States." *Id.*

This Court framed the question presented and its answer solely in terms of personal jurisdiction. The question presented was (*id.*):

> Since it [the district court] has personal jurisdiction over respondent [First National City Bank], has it power to grant the interim relief requested?

The Court answered that question in the affirmative (*id.* at 384):

> Once personal jurisdiction of a party is obtained, the District Court has authority to order it to "freeze" property under its control, whether the property be within or without the United States.

In light of the affidavits suggesting that the Uruguayan corporation was removing its assets from the United States, the Court found "[t]he temporary injunction issued by the District Court . . . to be eminently appropriate to prevent the further dissipation of assets." *Id.* at 385.

As it did with *Deckert*, GMD contends (GMD Br. 13) that the holding in *First National City Bank* is limited to suits in equity and has no application to actions at law "for money damages." As with *Deckert*, GMD attempts to graft its law/equity distinction on this Court's opinion even though that distinction finds no basis in the reasoning of this Court. Indeed, the Court's reasoning—that personal jurisdiction supplies the power to enjoin temporarily the dissipation of assets (*see id.* at 384)—flatly rejects the distinction on which GMD relies.[13]

Nor is it fair to read the Court's discussion of *De Beers* in *First National City Bank* as limiting the use of

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[13] Although a statute authorized the district court to grant the injunction at issue in *First National City Bank*, the text of that statute—which authorized injunctions "necessary or appropriate" to enforce the Internal Revenue Code (379 U.S. at 380 (quoting 26 U.S.C. § 7402(a))—added nothing to the federal court's traditional equity power. In any event, this Court based its holding not on the peculiarities of a tax injunction statute, but on the district court's authority over a party subject to the personal jurisdiction of the court. *See id.* at 384.

preliminary injunctions to assets that are the "ultimate relief sought in the litigation." GMD Br. 13. In distinguishing the result in *First National City Bank* (which upheld the preliminary injunction) from the result in *De Beers* (which did not), this Court in *First National City Bank* reasoned that the preliminary injunction in that case was proper because the bank accounts would be the subject of a final judgment if the plaintiff prevailed. By contrast, the injunction in *De Beers* was improper because the property at issue there could not have been the subject of the final judgment given that the only relief available in that case was an injunction against future unlawful conduct:

> Unlike *De Beers Consol. Mines v. United States*, 325 U.S. 212, there is here property which would be "the subject of the provisions of any final decree in the cause." *Id.*, 220. We conclude that this temporary injunction is "a reasonable measure to preserve the status quo" (*Deckert v. Independence Shares Corp.*, 311 U.S. 282) pending service of process on [the Uruguayan corporation] and an adjudication of the merits.

379 U.S. at 385. *First National City Bank*, therefore, requires not that the plaintiff claim an equitable interest in the enjoined property, but only that the property be subject to a final judgment. In the case presently before the Court, the enjoined property was subject to the final judgment not only because it would satisfy the judgment of $82,444,259 that GMD owed to the Investors, but also because the district court in its final judgment ordered the enjoined property to be turned over to the Investors. *See* Pet. App. 59a; J.A. 111.

The preliminary injunction issued by the district court below is fully consonant with the one upheld in *First National City Bank*. In both cases, the district court had personal jurisdiction over the foreign defendant; plaintiff satisfied all the prerequisites for a preliminary injunction; the defendant was effectively dissipating its principal asset; the dissipation of the assets would have

rendered a judgment in plaintiff's favor ineffectual; and plaintiff sought a money judgment for a specific amount of money. The primary difference between the two cases is that the government in *First National City Bank* sought to foreclose a lien while the plaintiffs in this case seek to collect a debt. That is a distinction without a difference. As this Court held in *First National City Bank*, the district court's power to enjoin the dissipation of assets pending the outcome of litigation rests on its personal jurisdiction over the defendant, not on any characteristic of the assets the defendant might dissipate.

3. *De Beers Consolidated Mines v. United States*

Between *Deckert* and *First National City Bank*, both of which approved of preliminary injunctions to enjoin the dissipation of assets, this Court decided *De Beers*. In that case, the Court reversed a preliminary injunction as inconsistent with the "principles of equity" (325 U.S. at 219), because the injunction restrained the use of property that "in no circumstances can be dealt with in any final injunction that may be entered" (*id.* at 220).

In *De Beers*, the United States brought an equitable action against several foreign corporations and individuals in which it sought a permanent injunction prohibiting future violations of the antitrust laws. The government did not, and could not, sue for money damages. As the Court explained (*id.* at 219-20):

> Under the Sherman Act and the Wilson Tariff Act, the District Court has no jurisdiction in this suit to enter a money judgment. Its only power is to restrain the future continuance of actions or conduct intended to monopolize or restrain commerce.

Although the final relief sought by the United States could not affect the defendants' property, the government nonetheless obtained an *ex parte* restraining order against banks in which the defendants had accounts and that order was continued in a preliminary injunction. *See id.*

at 216. In support of that relief, the government's counsel filed an affidavit which stated that defendants sold abroad and required payment in advance (*see id.*) and argued that the injunction would provide security in the event contempt proceedings were necessary to enforce the final decree (*see id.* at 215). As the Court explained, "[i]n truth the purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court." *Id.* at 219. "Its issue," the Court pointed out, "furthermore presuppose[d] or assume[d]" an eight-step hypothetical causal chain. *Id.*

This Court reversed the preliminary injunction on the ground that the "general principles which govern the granting of equitable relief" (*id.* at 218-19) do not authorize the issuance of a preliminary injunction to restrain assets which could not be affected by the final judgment and which would at most provide security for a hypothetical contempt judgment (*id.* at 220):

> It [the district court], of course, has the power, pending final action in this respect, to restrain action or conduct violative of the statute. A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit. It deals with property which in no circumstances can be dealt with in any final injunction that may be entered.

The Court concluded that a preliminary injunction may not be sustained "as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt." *Id.* at 220.

Unlike *De Beers*, here there is no dispute that the assets that GMD seeks to dissipate would be used to satisfy a final judgment in favor of the Investors. Indeed, those very assets were subject to the district court's subsequent Turnover Order. GMD contends, however, that *De Beers* should be given an expansive reading and understood to mean that "a preliminary injunction may not issue to secure assets for a final judgment if the assets to be restrained are not of the same 'character' as the subject of the plaintiff's underlying action." GMD Br. 11. By that, GMD contends that the preliminary injunction must be "directly related" (GMD Br. 12) to the "same *res* or thing that is the subject of [the plaintiff's] underlying claim" (GMD Br. 10).

Contrary to GMD's contention (GMD Br. 10-12), *De Beers* does not draw a distinction between assets that are directly related, on the one hand, or indirectly related, on the other hand. As this Court itself explained, the preliminary injunction at issue in *De Beers* was improper because the defendants' bank accounts could "in no circumstances" (325 U.S. at 220) be the subject of the final judgment, not because their relationship to the case was not sufficiently direct. Moreover, a test that turns on the proximity of the relationship between the assets and the subject matter of the litigation—such as that proposed by GMD—would be impossible to apply in practice. In this case, for example, GMD used $108 million of the net proceeds from the sale of the Notes to repay debt incurred, in part, to refinance its investment in the toll roads. *See* C.A. 38, 56-58. The Government Notes referenced in the preliminary injunction are thus "directly related" to the Notes because the proceeds from the sale of those Notes helped finance the construction of the toll roads and the Toll Road Receivables are, in turn, the assets to be exchanged for the Government Notes.

Nor is it fair to suggest that this Court was concerned in *De Beers* with "extending a district court's equitable powers to issue preliminary injunctions outside of the subject matter of the plaintiff's claim." GMD Br. 12. Instead, this Court was concerned with restraining the use of assets that could "in no circumstances" be affected by the final judgment. 325 U.S. at 220. And this Court was especially concerned that such a gratuitous restraint might

be imposed based solely on a lawyer's affidavit—on "a mere statement of belief that the defendant can easily make away with or transport his money or goods." 325 U.S. at 222. But this Court's concern with the gratuitous restraint in *De Beers* has no application here. As the court of appeals pointed out: "this 'parade of horribles' will not come to pass. The defendant's rights are adequately protected because the traditional requirements for obtaining equitable relief must be met before a district court may issue an injunction." Pet. App. 15a. Thus, a preliminary injunction restraining the dissipation of assets cannot issue on "a mere statement of belief" that the defendant "can" transfer his assets. The concern underlying *De Beers* is particularly misplaced in this case. GMD conceded in the court below that the Investors would likely succeed on the merits and would be irreparably harmed in the absence of the preliminary injunction. *See* GMD Br. 7.

Lastly, GMD contends that permitting a district court to enjoin temporarily the dissipation of assets in cases for money damages would stand "the rationale for this Court's decision on its head" and lead to "the anomalous conclusion that a district court presiding over an action at law for money damages has more expansive power to award interim equitable relief . . . than a court adjudicating an equitable claim." GMD Br. 13-14. Not so. After the fusion of law and equity in the federal courts, a district court has precisely the same power to award interim equitable relief in actions at law and suits in equity. As this Court explained in *De Beers*, "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." 325 U.S. at 220. Only if the final relief cannot affect assets would *De Beers* prohibit a preliminary injunction restraining the use of those assets. *See id.* Because the Government Notes could "be dealt with in any final injunction that may be entered" (*id.*), the preliminary injunction entered by the district court below is entirely consistent with this Court's decision in *De Beers*.

B. The Application Of Federal Equity Power Is Not Confined To Situations In Which It Has Traditionally Been Applied

The preliminary injunction issued by the district court in this case is in principle no different from the ones approved by this Court in *Deckert* and *First National City Bank*. It is also readily distinguishable from the one reversed by this Court in *De Beers*. Accordingly, the preliminary injunction order should be affirmed on those authorities alone.

The preliminary injunction order would also be sustainable even if this case were deemed to be one of first impression. The district court had personal jurisdiction over GMD and the Guarantors and they concede that the preliminary injunction satisfies the standard for such relief —namely, that the Investors were likely to succeed on the merits of their claim and would suffer irreparable injury in the absence of preliminary injunctive relief. *See supra* p. 7. GMD disagrees.

GMD contends that federal courts' equity power "must be exercised with caution and restraint" (GMD Br. 15 (internal quotation omitted)); that preliminary injunctions are "appropriate" only if they are used "in circumstances where such long unquestioned 'power is of ancient origin,' " (GMD Br. 15 (internal quotation omitted)); and that "[t]here is no traditional predicate for the preliminary injunction issued by the district court in this case" (GMD Br. 16). GMD's grudging reading of federal equity power is inconsistent with this Court's exposition of equitable power and confuses the equity power granted by Congress with the inherent power asserted by the federal courts.

1. Contrary to GMD's contention (GMD Br. 15), this Court has never intimated that federal equity power should be exercised with "caution and restraint." Rather, this Court has consistently painted federal equity power in broad and flexible terms.[14] In particular, this Court has

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[14] *See, e.g., International Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947) (the district courts "are invested with large discre-

emphasized that a hallmark of equity is its flexibility and adaptability to new situations. *See, e.g., Hecht Co. v. Bowles,* 321 U.S. 321, 329-30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). Accordingly, federal courts have adapted and applied traditional equitable principles to redress new wrongs:

> The ingenuity of man in devising new forms of wrong cannot outstrip equity in its development. In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose.

1 JOSEPH STORY, EQUITY JURISPRUDENCE § 4, at 5 (14th ed. 1918).

2. GMD's cramped view of federal equity power rests on its conflation of equitable power with inherent power. The cases on which GMD relies concern not equitable power, but inherent power. *See* GMD Br. 15, 18 (*citing, e.g., Chambers v. NASCO,* 501 U.S. 32, 44 (1991); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 629-30 (1962); *Snyder v. Harris,* 394 U.S. 332, 340 (1969)). The Court construes inherent power narrowly because it is implied by the courts without the authority of either

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tion to model their judgments to fit the exigencies of the particular case"); *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944) ("sound discretion" conferred on federal district courts); *Prendergast v. New York Tel. Co.,* 262 U.S. 43, 50-51 (1923) ("the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court"); *Meccano, Ltd. v. Wanamaker,* 253 U.S. 136, 141 (1920) ("sound discretion of the trial court").

of the political branches of government. *See, e.g., Degen v. United States,* 517 U.S. 820, 823 (1996) ("The extent of [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."); *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.").[15]

Whatever modesty marks this Court's exercise of inherent power has no application to equitable power. Congress vested the federal courts with equity jurisdiction beginning with the Judiciary Act of 1789. That Act conferred upon the inferior federal courts jurisdiction "of all suits . . . in equity." Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78.[16] Because equity jurisdiction emanates

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[15] Even if Congress had not given equity jurisdiction to the inferior federal courts, those courts' inherent power would support preliminary injunctions against the dissipation of assets at least in extraordinary cases, such as the one below, where the defendants filed a false affidavit, failed to raise arguable defenses or prosecute alleged counterclaims, and otherwise used the delays inherent in the judicial process to buy time to dissipate their principal asset in an effort to deprive the plaintiffs of payment on a just debt. *See supra* pp. 4-6. This Court need not explore the outer limits of federal courts' inherent power to issue preliminary injunctions in this case, however, because the congressional grant of equitable power is more than ample to sustain the preliminary injunction issued by the district court here.

[16] The phrase "suits in equity" "has been understood to refer to suits in which relief is sought according to the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts." *Gordon v. Washington,* 295 U.S. 30, 36 (1935).

The historical background to the First Judiciary Act demonstrates that Congress's decision to vest the inferior federal courts with equity power was a considered one and not simply a reflexive incorporation of a practice familiar from colonial days. When the Members of Congress debated the First Judiciary Act in 1789, the anti-chancery party favored the complete abolition of equity juris-

from Acts of Congress, the federal courts should not be reluctant to exercise equity power and they should not confine the exercise of that power to situations for which they can identify a "traditional predicate." GMD Br. 16.[17]

3. The development and successful use of *Mareva* injunctions demonstrate that (a) the power to enjoin the dissipation of assets pending the outcome of litigation flows from traditional equitable principles and (b) that power is essential to preserve the *status quo* and protect courts' power to do justice in commercial disputes involving assets that are increasingly intangible, impermanent, and instantly transferable. The *Mareva* injunction is an interlocutory remedy that originated in England. It enables a court to freeze the assets of a defendant over which it has personal jurisdiction to prevent that defendant from frustrating a potential judgment by disposing of those assets or removing them from the jurisdiction. *See*

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diction. *See, e.g.*, Charles E. Clark & James Wm. Moore, *A New Civil Procedure*, 44 YALE L.J. 387, 397 (1935). After a heated contest, however, the anti-chancery party was defeated and the Act ultimately provided for jurisdiction "of all suits . . . in equity," 1 Stat. 73, 78, except "[t]hat suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Ch. 20, 1 Stat. 73, 82; *see* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 2App.100[1] (3d ed. 1998).

[17] Contrary to GMD's contention (GMD Br. 16), the English Chancery Court's decision in *Lister & Co. v. Stubbs*, [1890] 45 Ch. D. 1 (Eng. C.A.), does not establish that "until 1975, the English Courts of Chancery did not possess the power to grant an interlocutory order enjoining a defendant from disposing of its assets or removing them from the jurisdiction before a judgment was rendered." As GMD's own description of *Lister* suggests, the English Chancery Court declined to issue an interlocutory order based on the facts of that case, not a lack of power. *See* GMD Br. 16 (the "plaintiff could not show that the undisclosed commissions . . . was money belonging to the plaintiff"). Tellingly, Lister & Co., which was the plaintiff in that case, did not even allege that its former employee, who was the defendant, was dissipating assets or was insolvent and would be unable to satisfy a money judgment if the company prevailed on its claim.

RICHARD N. OUGH AND WILLIAM FLENLEY, THE MAREVA INJUNCTION AND ANTON PILLER ORDER 3 (2d ed. 1993). *Mareva* injunctions do not give plaintiffs any lien or security interest in the frozen assets and are thus similar to the preliminary injunction issued by the district court below. *See id.*[18] *Mareva* injunctions have been issued by courts in most common law countries, including the United Kingdom, Australia, Canada, Malaysia, New Zealand, and Singapore. *See, e.g.*, Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Money Judgments*, 67 WASH. L. REV. 257, n. 337 (1992).

Although the English Chancery Court recognized the *Mareva* injunction in its 1975 decision in *Mareva Compania Naviera, S.A. v. International Bulk Carriers, S.A.*, [1975] 2 Lloyd's Rep. 509 (Eng. C.A.), that decision rests on the traditional uncodified power of the Chancery Court to issue injunctions in cases in which it would be "just or convenient." The *Mareva* Court based its decision on section 45 of the Judicature Act of 1925, which re-enacted section 25(8) of the Judicature Act of 1873, which in turn provided: "A mandamus or injunction may be granted . . . in all cases in which it shall appear to the court to be just or convenient." The Judicature Act of 1873 itself merely codified the Chancery Court's equitable powers. *See North London Ry. Co. v. Great Northern Ry. Co.*, [1883] 11 Q.B.D. 30, 37-39, per Brett and Cotton, L.J.J. (the Judicature Act of 1873 "has not given any Court a jurisdiction which no Court had before . . . there is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which before the Judicature Act there was no legal right . . . or no legal liability . . . ."); I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES 330-31 (5th ed. 1997) ("The actual power or jurisdiction to grant injunctions

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[18] The requisite showing to obtain a *Mareva* injunction is comparable to the showing required for a grant of injunctive relief pursuant to Rule 65. *See, e.g.*, Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Money Judgments*, 67 WASH. L. REV. 257, 339-47 (1992).

has remained the same, since, given jurisdiction over the person of the defendant, in courts of equity it has always been without limit, and could indeed be exercised . . . in the creation of a new equitable right, as the court thought fit . . . ."); Marion Hetherington, *Introduction to the Mareva Introduction, in* MARVEVA INJUNCTIONS 7-8 (Marion Hetherington ed., 1983) ("the [1873] enactment was merely procedural in that it extended equity's injunctive power to the common law courts without increasing the scope of that jurisdiction."). The power to issue *Mareva* injunctions thus flows from the same uncodified equity jurisprudence that Congress bequeathed to the federal courts. GMD's suggestion that the original *Mareva* injunction is a creature of statute (*see* GMD Br. 17 n.8) is without merit.

English courts have found *Mareva* injunctions to be singularly effective, in the extraordinary cases to which they apply, and a necessary tool to ensure that English judgments are not frustrated:

> We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the court's orders as to resisting the making of such orders on the merits of their case.

Derby & Co. Ltd. v. Weldon, [1989] 1 All E.R. 1002, 1007; *see Babanaft Int'l Co. S.A. v. Bassatne* [1988] 1 All E.R. 433, 444 ("some situations, which are nowadays by no means uncommon, cry out, as a matter of justice to plaintiffs, for . . . *Mareva*-type injunctions covering foreign assets of defendants even before judgment.").

Adoption of GMD's theory that injunctions may issue only if they can be traced back to a "traditional predicate" (GMD Br. 16) would shackle federal equitable power to the "circumstances" in which it was "exercise[d]" (GMD Br. 15) in colonial times. It would foreswear preliminary injunctions against the dissipation of assets in commercial litigation no matter how duplicitous the defendants, how mobile the assets, or how frivolous the pleadings interposed to delay the judicial process and avoid judgment on a just debt. It would also call into question the availability of injunctions outside commercial law, in cases to redress violations of civil rights, unfair competition, trademark infringement, trade secret misappropriation, and other substantive law. Injunctive relief in many of those areas developed after 1789, and even if statutes authorize the issuance of injunctions in some cases, the grants of judicial authority simply refer back to traditional equitable principles—which would be ossified by the legal theory GMD advances in this case.

C. The Exercise Of Federal Equity Power As Codified In Rule 65 Is Independent Of And Does Not Circumvent State Prejudgment Attachment Law Incorporated By Rule 64

GMD declares (GMD Br. 18) that Federal Rule of Civil Procedure 64, which incorporates state prejudgment attachment law, is "the exclusive source of district court authority to grant provisional remedies," even though it "does not state [that] in so many words." On that half-hearted premise, GMD contends (GMD Br. 20) that permitting the district court to issue a preliminary injunction under Federal Rule of Civil Procedure 65 would "circumvent" Rule 64.

Contrary to GMD's contention (GMD Br. 18, 20), the equitable power of federal courts, which is codified in Rule 65, is not subject to limitation absent a "clear statement," which Rule 64 plainly is not. Moreover, the application of Rule 65 cannot circumvent Rule 64 because the separate origins of the two rules demonstrate that they operate independently of each other.

1. Limitations on federal equitable power are subject to a "clear statement" rule and Rule 64 is not such a clear statement. As this Court declared in *Porter v.*

Warner Holding Co., 328 U.S. 395, 398 (1946): "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." [19] GMD concedes, as it must, that Rule 64 "does not state in so many words that it is the exclusive source of district court authority to grant provisional remedies." GMD Br. 18. It follows that the state prejudgment attachment laws incorporated by Rule 64 do not limit federal courts' equity power codified by Rule 65.

It is no answer to contend, as does GMD (GMD Br. 18-20), that district courts must rely on "text-based authority derived from Congress rather than inherent power in every case where text-based authority applies." GMD Br. 18 (quoting *Chambers v. NASCO*, 501 U.S. at 64-65 (dissenting opinion)). That is so for three reasons. *First*, Rule 65 *is* "text-based authority." [20]

Second, even if Rule 65 did not exist, text-based authority (such as Rule 64) does *not* impliedly exclude other authority (such as federal equitable power), even if that

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[19] *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("The Secretary's reading of the statute is too grudging. Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."); *Hecht Co. v. Bowles*, 321 U.S. at 329-30 ("[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities [of the Act] in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices . . . ."); *Brown v. Swann*, 35 U.S. (1 Pet.) 497, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.").

[20] Although GMD asserts (GMD Br. 18 n.9) that Rule 65 "does not itself authorize preliminary injunctive relief," it has long been understood that Rule 65 "may be read as a codification of the traditional federal equity practice." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2943, at 79 (2d ed. 1995).

other authority has not yet been reduced to rule. GMD's sole support for the notion that this Court must rely exclusively on textual authority is a *dissenting* opinion in a case concerning inherent power. *See* GMD Br. 18 (quoting *Chambers*, 501 U.S. at 64-65 (dissenting opinion)). Whatever the merits of that dissent, the Court held that "the inherent power of a court can be invoked *even if procedural rules exist which sanction the same conduct*." *Id.* at 49 (emphasis added; referring to FED. R. CIV. P. 11).[21]

Third, this Court implicitly rejected GMD's contention (GMD Br. 18) that Rule 64 is "the exclusive source of district court authority to grant provisional remedies" in *De Beers*. In that case, the Court observed that "[t]he Government disclaims any benefit from Rule 64," because "there is no federal statute" and New York law will not issue an attachment "in an equity suit such as the instant one." *De Beers*, 325 U.S. at 218. Under GMD's exclusive-authority theory, the Court's opinion should have ended there. It did not. Instead, the Court embarked on an extended analysis of whether the preliminary injunction in that case was consistent with "the principles of equity." *Id.* at 219. Although the Court ultimately held that the injunction was not consistent with those principles, its analysis makes plain that the unavailability of prejudgment attachment under Rule 64 does not foreclose the availability of a preliminary injunction against the dissipation of assets under Rule 65.

2. Even if federal equitable power were subject to implied limitations—which it is not—Rule 64 would not even impliedly limit Rule 65 because the two rules originated and operate independently of each other. Before 1938, separate rules governed actions at law and suits in equity in the federal courts. Rule 64 originated in statu-

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[21] Other examples in which a federal rule and uncodified federal power co-exist include *in limine* rulings, *see Luce v. United States*, 469 U.S. 38, 41 n.4 (1984), and the qualified work product immunity, *see* JAMIE GORELICK ET AL., DESTRUCTION OF EVIDENCE § 3.5, at 80 (1989).

tory provisions governing prejudgment attachment in actions at law.[22] By contrast, Rule 65 originated in Federal Equity Rule 73.[23] The two rules thus originated on separate sides of the division between law and equity and each operated independently of the other. The fusion of law and equity did not bring them into conflict. *See Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 382 n.26 (1949) ("Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected."); 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65 App. 101[2], at 65 App.-14 (3d ed. 1998) ("Rule 64 does not deal with the equitable remedy of injunction."). As one commentator concluded: "While Rule 65 does not attempt to state when the equitable injunction is proper, to hold

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22 Rule 64 originated in the Judiciary Act of 1872, which governed actions at law. *See* Judiciary Act, ch. 255, §§ 5-6, 17 Stat. 196, 197 (1872). One part of that Act, known as the Conformity Act, required federal district courts to apply "as near as may be" the procedure applicable to actions at law in the states in which they sat. *See* Revised Statutes § 914, 28 U.S.C. § 724 (1940). Section 915 of the Conformity Act incorporated state attachment law. *See* Revised Statutes § 915, 28 U.S.C. § 726 (1940). In 1937, Rule 64 adopted and superseded § 915 of the Conformity Act, which was formally repealed in 1948. *See* FED. R. CIV. P. 64 advisory committee's note (1937). Rule 64 has never been amended.

23 Federal Rule of Civil Procedure 65 originated in Rule 73 of the Federal Equity Rules of 1912. *See* Rules of Practice for the Courts of Equity of the United States, 33 S. Ct. xix, xxxix (Nov. 4, 1912). The Clayton Act of 1914 largely adopted Equity Rule 73. *See* 28 U.S.C. §§ 381, 382, 383 (1940). Rule 65, in turn, essentially restated §§ 381, 382, and 383. *See* FED. R. CIV. P. 65 advisory committee's note (1937); *see also* RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 336 (William W. Dawson ed., 1938) ("Passing to Rule 65: This is largely the re-enactment, so to speak, of the present statutory provisions. Paragraphs (a) and (b) are taken from Title 28, Section 381, and the rule is substantially the same, also, as Equity Rule 73."). Sections 381, 382, and 383 were formally repealed in 1948. *See* 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 65App.101[1], at 65App.-12 (3d ed. 1998).

that the grant or denial of such an injunction is generally dependent upon state law pursuant to Rule 64 would have completely uprooted federal practice as it was when the Federal Rules were promulgated in 1937, which was not intended." 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 64.04[3], at 64-19 (2d ed. 1996).[24]

III. THIS COURT'S DECISION IN *ERIE R.R. CO. v. TOMPKINS* DOES NOT REQUIRE REVERSAL OF THE JUDGMENT BELOW

This Court should not consider the *Erie* issue because GMD raises it for the first time in this Court. If the Court is inclined to reach that issue regardless, it should hold that *Erie* does not require reversal of the judgment below. There is no conflict between New York law and federal law. Even if they were in conflict, the district court properly applied federal law.

A. The *Erie* Issue Is Not Properly Before The Court Because It Is Not Fairly Included In The Question Presented And Was Not Pressed Or Passed On By Any Court Below

In this Court, parties may not raise issues that are not fairly included in the question presented and pressed or passed on by the lower court. GMD's opening brief on the merits violates both rules. It rewrites the question presented and briefs an issue neither pressed nor passed on by any court below. In accordance with its consistent practice, the Court should decline to address the *Erie* issue. *See* 22 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 405.03[2], at 405-16 (1998).

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24 Contrary to GMD's contention (GMD Br. 19-20), the preliminary injunction here was not an attachment in disguise. It gave the investors neither a lien nor a security interest. At any time, GMD was free to place its assets into an insolvency proceeding under Mexican or any other applicable law. *See supra* p. 6.

1. *The* Erie *Issue Is Not Fairly Included In The Question On Which The Court Granted Review*

The rules of this Court plainly limit the issues to those fairly included in the question presented. Rule 14.1(a) provides that: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." *See Yee v. City of Escondido,* 503 U.S. 519, 535-36 (1992) (explaining importance of Rule 14.1(a)). Rule 24.1(a) similarly provides that a Supreme Court merits brief should not "raise additional questions or change the substance of the questions already presented in [the petition]." *See, e.g., Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992) (refusing to consider an argument raised for the first time in petitioner's opening merits brief on the authority of Rules 14.1 and 24.1(a) and stating that "alter[ation]" or "addition[s]" to the questions presented would, absent unusual circumstances, thwart "the integrity of the process of certiorari"); *see also Bragdon v. Abbott,* 118 S. Ct. 2196, 2205 (1998); *Blessing v. Freestone,* 117 S. Ct. 1353, 1359 n.3 (1997).

The *Erie* issue is not fairly included in the question on which the Court granted certiorari and the Court should not address it. In its merits brief, GMD expanded the question presented in the certiorari petition by adding the phrase "in diversity jurisdiction" in order to raise the *Erie* issue. Before its opening merits brief in this Court, GMD had not raised the Rules of Decision Act, 28 U.S.C. § 1652, or *Erie R.R. Co. v. Tompkins,* 304 U.S. 64. Hence, at the time it granted certiorari, this Court had no warning that, in GMD's view, the rule of decision was supplied not by federal law, but by state law. To permit GMD to use a circuit conflict on a federal-law issue as bait, and then switch to a state-law issue on the merits, would destroy the integrity of this Court's certiorari process.

2. *This Court Should Not Entertain The* Erie *Issue Because It Was Neither Pressed Nor Passed On By Any Court Below*

"[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 234 n.1 (1976); *see, e.g., Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970). Because GMD did not press the *Erie* issue in either of the courts below, and because neither of those courts passed on that issue, it is not properly before this Court. Not only did GMD waive the *Erie* issue, but it would be inappropriate for this Court to resolve a purported conflict between federal and state law without the benefit of opinions from the courts most familiar with the relevant state law. *See, e.g., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 499-500 (1985) ("district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States"). Deciding the *Erie* issue in the absence of guidance from the lower courts is especially hazardous where, as here, the parties disagree on the content of state law.

B. Even If State Law Governs The Issuance Of Injunctions By Federal Courts In Diversity Cases, The Preliminary Injunction Entered In This Case Is Consistent With Applicable New York Law

Even if GMD is correct that the district court should have applied New York law in determining whether to issue the injunction, no *Erie* concern is raised because the injunction was consistent with applicable New York law. *Erie* holds that a federal court exercising diversity jurisdiction should, in essence, apply substantive state law and federal procedural law. Federal law conflicts with state law only when there is an "unavoidable clash" between the federal rule and the state law. *Walker v. Armco Steel*

Corp., 446 U.S. 740, 749-50 (1980). A review of New York law reveals that the federal rule and state law agree.

New York law authorizes preliminary injunctions to preserve the *status quo* and protect against actions that would tend to render the judgment ineffectual:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual . . . .

N.Y.C.P.L.R. § 6301 (McKinney 1980). Although GMD cites C.P.L.R. § 6301 for the proposition that New York law does not provide for preliminary injunctive relief "in an action for money damages" (GMD Br. 27), the text of the statute does not exclude actions for money damages.[25] To be sure, the general rule in New York (and elsewhere) is that: "Where a plaintiff is seeking money damages for tort or breach of contract, a preliminary injunction generally is not appropriate to provide security for a potential recovery." JACK WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE ¶ 6301.10, at 63-27, 63-28 (1998). But where a preliminary injunction is intended to preserve the *status quo* and protect the court's ability to render an effectual judgment, that rule does not apply. *See, e.g., Zonghetti v. Jeromack*, 541 N.Y.S.2d 235, 237 (App. Div. 2d Dep't 1989) ("[T]he uncontrolled sale and disposition by the defendants of their assets would threaten to render ineffectual any judgment which plaintiffs might obtain. Given the underlying realities of this particular

[25] GMD also suggests (GMD Br. 26) that the repeal in the Civil Practice Law and Rules ("CPLR") of section 878(2) of the Civil Practice Act ("CPA") somehow limited New York courts' powers to issue injunctions in actions for money damages. That suggestion is incorrect. Section 878(2) was replaced by Article 62 of the CPLR, "Attachment," and has no relation to Article 63, "Injunction." The predecessor CPA section to CPLR 6301, is section 878(1), which is essentially reproduced in the CPLR.

situation, we find the status quo is best preserved by the granting of the preliminary injunction.") (internal quotations and citations omitted); WEINSTEIN ET AL., *supra* p. 44, ¶ 6301.11, at 63-31 (identifying exception to general rule where "there is a showing that the defendant is dissipating assets or proceeds that would otherwise be available to a victorious plaintiff."); *see also H.I.G. Capital Management, Inc. v. Ligator*, 650 N.Y.S.2d 124, 125 (App. Div. 1st Dep't 1996) (injunction restraining the transfer of assets was justified under arbitration statute and would also have been within court's discretion, "[e]ven were standards of CPLR article 63 applicable," where "[t]he uncontrolled disposal of respondents' assets, which might render an award ineffectual, presents the risk of irreparable harm").[26]

New York courts also issue preliminary injunctions based on that State's common law to preserve the *status quo*—even where the plaintiff seeks money damages. *See, e.g., Ma v. Lien*, 604 N.Y.S.2d 84, 85 (App. Div. 1st Dep't 1993) (granting preliminary injunction to place periodic payments from winning lottery ticket in escrow where ticket holder intended to share his winnings with his family, because "if the requested relief is not granted, a substantial amount of money may be dissipated or otherwise unavailable for recovery"); *Pando v. Fernandez*, 508 N.Y.S.2d 8, 9 (App. Div. 1st Dep't 1986) (*semble*); *R. Prescott & Son v. Nye*, 228 N.Y.S. 156, 158 (App. Div. 3d Dep't 1928) ("It appears that Nye is insolvent,

[26] The cases cited by GMD (GMD Br. 27) for the contrary proposition are inapposite. In both cases, the courts held that the plaintiffs had failed to demonstrate irreparable injury because they had not demonstrated that the defendants were in financial distress and thus likely to be unable to pay or able to prevent a meaningful recovery. *See Daley v. Related Cos., Inc.*, 581 N.Y.S.2d 758, 762 (App. Div. 1st Dep't 1992); *Rosenthal v. Rochester Button Co.*, 539 N.Y.S.2d 11, 13 (App. Div. 1st Dep't 1989). By contrast, in this case, the district court found that GMD had a "negative net worth of approximately $214 million" and was "at risk of insolvency if not already insolvent." Pet. App. 25a.

and that, if the money came into his hands, it would immediately be seized by other creditors, and any lien plaintiff has will be lost. . . . [A] temporary injunction order would seem a proper remedy to preserve the property in statu quo. . . ."); *see also Air Traffic Conference v. Downtown Travel Ctr., Inc.*, 383 N.Y.S.2d 805, 807 (Sup. Ct. N.Y. County 1976); *Rolnick v. Rolnick*, 230 N.Y.S.2d 789, 791 (Sup. Ct. Queens County 1962).

In sum, the statutory and common law of New York both authorize the issuance of preliminary injunctions against the dissipation of assets to preserve the *status quo* and protect the court's ability to render effectual relief. Because the district court has the same power under federal and New York law, and because GMD concedes that the preliminary injunction properly issued if power to order it exists (*see* GMD Br. 7), it follows that this Court need not decide the *Erie* issue and may simply affirm the interlocutory order.

C. Under This Court's Decision In *Hanna v. Plumer*, Federal Law Governs The Issuance Of Injunctions By Federal Courts Because Rule 65 Governs That Procedure

When a Federal Rule of Civil Procedure governs an issue, a court sitting in diversity should apply that rule even in the face of conflicting state law. *See Hanna v. Plumer*, 380 U.S. at 471. In *Hanna*, this Court prescribed the analysis for determining whether a Federal Rule of Civil Procedure should be applied. *Erie* plays no part in this analysis as long as the Federal Rule governs the situation. *See id.* at 470-71. If the Federal Rule governs, this Court asks whether the Rule exceeds the authority granted by Congress in the Rules Enabling Act ("REA") or violates the Constitution. *See id.* at 463-64. As long as the answer to both questions is "no," the Federal Rule applies regardless of contrary state law. *See id.* at 473-74.

Rule 65 authorized the preliminary injunction entered by the district court below (*see, e.g.*, 11 CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2493, at 390 (1973)) and is well within the bounds of the REA and the Constitution. Rule 65 simply reduced statutory power to rule and thus could not possibly "abridge, enlarge, or modify any substantive right" within the meaning of the REA.

D. Alternatively, Even If Federal Law Conflicted With State Law, The Federal Interest In Having Uniform Equitable Remedies And Entering Effectual Judgments Outweighs Any Asserted State Interest In Discouraging Forum Shopping Between State And Federal Courts

If Rule 65 does not govern the preliminary injunction issued below, the question is whether the federal law is procedural, in which case it was properly applied, or substantive, in which case the state law should have been applied. In an early interpretation of *Erie*, this Court set forth an "outcome-determination" test to answer that question: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim in a State court?" *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945). The Court subsequently qualified *Guaranty Trust*, holding in *Hanna* that choices between state and federal law are to be made not by application of any automatic, "litmus paper" criterion, but rather by reference to the policies underlying the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. *Hanna*, 380 U.S. at 467.

Preliminary injunctions are a provisional remedy and do not determine the ultimate outcome of litigation. Therefore, the federal law governing preliminary injunctions is procedural.[27] As such, it was properly applied in

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[27] Although this Court has not addressed the issue, lower federal courts agree that the decision whether to issue a preliminary injunction is one of procedure. *See, e.g., Glude v. Sterenbuch*, 133 F.3d 914 (4th Cir. 1998) (unpublished disposition); *Elliott v. Kiesewetter*, 98 F.3d 47, 52 (3d Cir. 1996); *Southern Milk Sales,*

this case. *Guaranty Trust*, 326 U.S. at 108-09; *see also Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958) (federal courts should conform to state rules "where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court").

Even if the choice between federal and state law were determinative of the outcome, this Court applies federal law if a strong federal policy is implicated. *See Byrd*, 356 U.S. at 537-38. In *Byrd*, the Court held that *Erie* did not require a district court sitting in diversity to follow South Carolina decisional law, which allocated a determination to the judge, over federal practice, which allocated the same determination to the jury. The Court reasoned that the federal rule affected the "essential characteristics" of the federal courts and should not yield to a contrary state rule in a diversity case. Such rules necessarily implicate a "strong federal policy" precisely because "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* The Court emphasized that state law cannot be allowed to disrupt or "alter the essential character or function of a federal court." *Id.* at 539 (quoting *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931)); *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 431-32 (1996) (citing *Byrd*'s holding that the "outcome determination" test is insufficient in cases involving countervailing federal interests and applying the *Byrd* analysis to the federal interest at stake there).[28]

Inc. v. Martin, 924 F.2d 98, 101-02 (6th Cir. 1991); *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991); *Equifax Servs., Inc. v. Hitz*, 905 F.2d 1355, 1361 (10th Cir. 1990); *Jackson Dairy v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *General Electric v. American Wholesale Co.*, 235 F.2d 606, 608 (7th Cir. 1956); *see also* CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, *supra* p. 46, § 2493, at 390.

[28] This Court in *Hanna* similarly emphasized the importance of uniformity in the federal courts in matters relating to the administration of legal proceedings,

Equitable power is an essential characteristic and function of the federal courts. Congress vested the federal courts with equity jurisdiction in the first Judiciary Act and has repeatedly reaffirmed that decision over the succeeding two centuries. That policy decision, which informed and is codified in part in Rule 65, merits the respect of this Court. It should not yield lightly to state law that, at most (accepting *arguendo* GMD's view of New York law), fails to aid plaintiffs in actions for money damages and embodies no considered policy to leave them without remedy. As the *Guaranty Trust* Court explained:

> State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. . . . [A] federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.

326 U.S. at 106; *see also Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 45-46 (1909) ("This controversy is within the equity jurisdiction of the courts of the United States, as heretofore recognized in this court, and such jurisdiction cannot be limited or in anywise curtailed by state legislation as to its own courts."); *Payne v. Hook*, 74 U.S. (1 Wall.) 425, 430 (1868) ("The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.").

"an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the *Erie* doctrine . . . was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority."

380 U.S. at 472-73 (*quoting Lumberman's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be dismissed as moot. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 16, 1999

APPENDIX

APPENDIX

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule of Civil Procedure 64 provides as follows:

Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Section 915 of the Revised Statutes, 28 U.S.C. § 726 (1940) (repealed 1948) provided as follows:

In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which were on June 1, 1872, provided by the laws of the State in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by State laws, shall be

first furnished by the party seeking such attachment or other remedy.

Sections 5 and 6 of the Judiciary Act of 1872, ch. 255, 17 Stat. 196, 197 (repealed 1948) provided as follows:

Sec. 5. That the practice, pleadings, and forms and modes of proceedings in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however*, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

Sec. 6. That in common-law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the State in which such court is held, applicable to the courts of such State; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the State in relation to attachments and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the State within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules aforesaid: *Provided*, That similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy.

* * * * *

Federal Rule of Civil Procedure 65 provides in pertinent part as follows:

Injunctions

(c) **Security.** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of any officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Sections 17, 18, and 19 of the Clayton Act of 1914, 28 U.S.C. §§ 381, 382, and 383 (1940) (repealed 1948) provided as follows:

§ 381. **Same; preliminary injunctions and temporary restraining orders.**

No preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the

verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days' notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Nothing in this section contained shall be deemed to alter, repeal, or amend section 380 of this title.

§ 382. **Same; security on issuance of.**

Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

§ 383. **Same; requisites of order; binding effect.**

Every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

Equity Rule 73 of the Rules of Practice for the Courts of Equity in the United States (repealed 1948) provided as follows:

Preliminary Injunctions and Temporary Restraining Orders

No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a preliminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or

judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office.

Supreme Court, U.S.
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No. 98-231

In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners,

v.

ALLIANCE BOND FUND, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners' parent corporations and non-wholly owned subsidiaries are listed in the Rule 29.6 Statement in Petitioner's Brief ii.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-231

GRUPO MEXICANO DE DESARROLLO, S.A., *et al.*,
Petitioners,

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ALLIANCE BOND FUND, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

This case is about the proper bounds of a federal district court's power to issue a preliminary injunction to prevent a defendant from using its assets during the pendency of litigation. As petitioners argued in their opening brief, a preliminary injunction can issue to safeguard a potential judgment only when it restrains the same assets that are the subject of the plaintiff's underlying equitable claim. Even if this Court holds that a federal district court's injunctive powers are broader, no such preliminary injunction should issue when the district court is exercising its diversity jurisdiction and the injunction would be unavailable under state law.

In their opposition brief, respondents have sought to avoid these issues at every turn, lodging procedural objections to petitioners' arguments and attacking the nomen-

clature used by petitioners. They also claim now, for the first time and in contravention of the court of appeals' ruling and respondents' own apparent concession below, that the preliminary injunction issued by the district court is permissible under New York law.

In a further effort to cloud the legal issues before the Court, respondents cast aspersions on GMD's pre-injunction assignment of certain assets to pay *bona fide* creditors, even though many of these assignments were made in consideration for a substantial discounting of GMD's debt or were mandated by Mexican law. There was nothing nefarious about them. Respondents are similarly wrong when they assert that the court of appeals "recognized that GMD's dissipation of Government Notes was an attempt to frustrate the Investors' eventual judgment, rather than an effort legitimately to reduce GMD's debt and pay off creditors." Resp. Br. at 7-8. The court of appeals made no such finding, nor was it, as an appellate body, in any position to do so. Respondents descend further into the muck when they suggest that GMD misrepresented the quantity of Government Notes that it assigned to creditors (Resp. Br. at 4) and "filed a false affidavit." Resp. Br. at 33 n.15. As respondents well know, GMD, on its own initiative, updated its submissions to the district court as soon as additional information became available (and before any ruling by the district court). Pet. App. 5a-6a. Any incompleteness in GMD's initial submission was attributable directly to the need to respond hurriedly, with information gathered from abroad, to respondents' *ex parte* application for a preliminary injunction.

When respondents' superficial objections and factual misstatements are stripped away, respondents' position can be seen for what it is—a demand for a far-reaching judicial expansion of the power of the federal district courts to afford equitable relief, without historical predicate,

guidance from Congress, or deference to state law prohibitions.

I. THIS APPEAL IS NOT MOOT

Respondents seek to avoid the merits of this case by arguing that, because the district court eventually entered a permanent injunction, petitioner's challenge to the preliminary injunction "has been rendered moot." Resp. Br. at 12. But this argument already has been made to, and rejected by, the court of appeals, and this Court granted review in the face of respondents' protestations of mootness. The district court entered the permanent injunction *before* the court of appeals affirmed the district court's issuance of the preliminary injunction. The court of appeals expressly rejected respondents' Suggestion of Mootness. J.A. 118. Respondents also claimed mootness in their response to GMD's cert. petition (Br. in Opp. 4 n.3), and this Court nevertheless granted the petition.

More important, respondents' mootness argument rests on a misreading of this Court's decisions. *University of Texas v. Camenisch*, 451 U.S. 390 (1981), the case on which respondents principally rely, is not comparable to the present case. There, a deaf student alleged that the University of Texas was violating § 504 of the Rehabilitation Act of 1973 by refusing to provide him with a sign language interpreter. The student sought and obtained a preliminary injunction ordering the University to pay for an interpreter while his suit was pending. *Id.* at 392. The court of appeals affirmed. *Id.* at 393. By the time the court of appeals rendered its decision, the University had obeyed the injunction by paying for the interpreter and the student had graduated. *Id.* This Court held that the University's appeal of the preliminary injunction was moot because the preliminary injunction no longer was having any real-world consequences, and the issue of whether § 504 required the University to pay for the interpreter could be resolved in a trial on the merits. Unlike GMD

here, the University in *Camenisch* did not have an independent claim for damages arising from the wrongful issuance of the injunction. The University did not challenge the injunction on any ground other than that relating to the underlying merits of the lawsuit. As a result, the University could obtain complete relief from the effects of the preliminary injunction by pursuing the case to final judgment. An ultimate determination that the University could not be required, under the statute, to pay for the student's interpreter would have entitled the University to a refund of what it had already paid. After the student graduated, in other words, the University's claim that the preliminary injunction was wrongful became identical to its position on the merits. *Camenisch* did not concern the power of the district court to issue a preliminary injunction but rather the proper interpretation of § 504 and whether it required the University to pay for the interpreter.

In this case, by contrast, GMD's claim for damages is totally independent of the merits of respondents' underlying lawsuit. GMD never contested the likelihood that respondents would prevail on the merits. Rather, GMD challenged the district court's power to issue a preliminary injunction to restrain a defendant's use of assets in order to preserve a potential money judgment. If GMD prevails here, it will be able to pursue damages arising from GMD's forced inability to restructure its debts and other financial obligations during the pendency of the preliminary injunction. *See* GMD Br. at 6-7.

Respondents contend that damages sustained as the result of the wrongful issuance of a preliminary injunction are not compensable if a permanent injunction issues before an appeal of the preliminary injunction is adjudicated. Resp. Br. at 13. That position is supported by neither logic nor authority. The right to seek damages arising from a wrongful preliminary injunction cannot depend on the speed at which the case is adjudicated on

the merits. Nor can a plaintiff's eventual entitlement to a permanent injunction automatically cure real economic injury arising from erroneous interim relief or insulate such erroneous interim relief from appellate review.[1]

II. THE PRELIMINARY INJUNCTION AT ISSUE CONSTITUTES AN IMPERMISSIBLE EXPANSION OF THE DISTRICT COURTS' EQUITABLE POWERS

Notwithstanding all their rhetoric, respondents ultimately do not deny that an affirmance of the court of appeals would require this Court to sanction a broad-based expansion of the district courts' equitable powers beyond those that currently exist or were exercisable in the English Courts of Chancery. Respondents concede that the kind of preliminary injunctive relief ordered by the district court in this case has never been approved by this Court, and they fail to identify any historical predicate—either under United States or English law—for its issuance. Although respondents claim (without citing any supporting authority) that the English Courts of Chancery always possessed the power to issue such an injunction, even respondents concede that those courts never actually exercised that power until the Court of Appeal decision in *Mareva Compania Naviera, S.A. v. International Bulk Carriers, S.A.*, 1975 2 Lloyd's Rep. 509 (Eng. C.A.).

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[1] Respondents question petitioners' decision not to appeal the entry of the permanent injunction. Resp. Br. at 19-20. But the law that would have governed such an appeal is very different from the law that should have controlled respondents' preliminary injunction application. Under New York law, a judgment creditor *can* obtain a restraining notice preventing the judgment debtor from transferring or assigning any property until the judgment is satisfied. C.P.L.R. § 5222 (McKinney 1994). Respondents nowhere explain why GMD should have been required to appeal a permanent injunction expressly authorized by statute so as to preserve its rights with respect to a preliminary injunction that was clearly unauthorized under New York law.

Similarly, although respondents claim that the equitable powers of the federal courts must be "flexible" and "adaptable," all of the cases and commentaries on which respondents rely concern a flexible application of existing equitable powers to novel factual contexts. They do not advocate flexibility in expanding the scope of the equitable powers that can be exercised by the district courts. Respondents try to articulate the advantages of arming the district courts with *Mareva*-type injunctive power, but this sort of argument ignores the fundamental point that in this country the expansion of the district courts' power is not within the province of the judiciary. The Constitution delegates such authority exclusively to Congress.

A. The Preliminary Injunction Is Not Supported By This Court's Holdings

As respondents concede, neither *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), nor *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), authorizes the issuance of a preliminary injunction to preserve assets to satisfy a potential money judgment. Resp. Br. at 22. Respondents argue, however, that the decisions in those cases "support the district court's preliminary injunction in principle." *Id.* This is wishful thinking. In both *Deckert* and *First Nat'l*, the preliminary injunctions were issued to preserve the same assets that were the subject of the plaintiffs' underlying equitable claims. Here, by contrast, respondents asserted a garden-variety breach of contract claim seeking fungible money damages.

The primary issue in *Deckert* was whether a plaintiff could assert an equitable claim under the Securities Act of 1933. That question was significant because, if the plaintiffs were precluded from asserting an equitable claim, they would have been unable to obtain a preliminary injunction restraining the disposition of common stocks that allegedly had been purchased with the money they were fraudulently induced to pay. Respondents argue that the

fact that the plaintiffs in *Deckert* proceeded by "a bill in equity . . . formed no part of this Court's *ratio decidendi*." Resp. Br. at 23. To the contrary, the Court considered the propriety of the preliminary injunction only after holding that an equitable action could be brought under the Securities Act. The legitimacy of plaintiffs' assertion of an equitable claim was, in the Court's view, a prerequisite to the availability of injunctive relief, thus implying that the preliminary injunction in *Deckert* would have been unavailable if plaintiffs' only claims under the Securities Act had been legal claims for money damages.

In *First Nat'l*, the government brought an action to foreclose a tax lien—the government did not sue for money damages. Resp. Br. at 24.[2] Respondents are correct in their assertion that the "primary difference" between this case and *First Nat'l* is "that the government in *First National City Bank* sought to foreclose a lien while the plaintiffs in this case seek to collect a debt." Resp. Br. at 27. But the distinction is significant. In *First Nat'l*, the government, as a result of its lien, had an equitable claim over a specific asset belonging to the defendant and obtained an injunction pursuant to a provision of the tax code. Here, by contrast, respondents brought an action at law for breach of contract seeking money damages. For respondents to assume that this Court would have sanctioned the issuance of the preliminary injunctions in *Deckert* and *First Nat'l* in the absence of an underlying equitable claim is pure speculation; moreover, the Court's discussion of the nature of the claims in those cases would have been entirely superfluous if, as respondents contend, district courts *always* have the authority to enjoin the use

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[2] As the government recognizes, *First Nat'l* "involved a specific statutory grant of injunctive authority and the paramount public interest in tax collection, elements that are not present in this case." Gov. Br. at 29. Petitioners do not challenge the propriety of a district court's issuance of a preliminary injunction pursuant to some statutory grant of authority.

or disposition of *any* assets whenever the courts conclude that such interim relief would be a desirable means of ensuring the enforceability of a potential final judgment.

De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945), like *Deckert* and *First Nat'l*, involved a claim for equitable relief—a permanent injunction preventing future violations of the Sherman Act and the Wilson Tariff Act. The Court held that the district court's preliminary injunction, prohibiting defendants from selling, transferring, or disposing of any property in the United States, was improper because it "deals with a matter lying wholly outside the issues in the suit." *Id.* at 220. Respondents assert that "*De Beers* does not draw a distinction between assets that are directly related, on the one hand, or indirectly related, on the other hand." Resp. Br. at 29. This comment misses the point. The *De Beers* holding presupposes the assertion of an equitable claim by the plaintiff. The Court addressed the relationship between the subject of the preliminary injunction and the ultimate relief sought by the government only because the government had asserted an equitable claim. The Court's language makes clear that, if the government had not sought final equitable relief, preliminary injunctive relief would have been unavailable for that reason alone, without any further inquiry into the connection between the preliminary injunction and the ultimate relief sought. *See* GMD Br. at 12.

Respondents seek to limit the scope of *De Beers* by arguing that this Court reversed the grant of the preliminary injunction because "the defendants' bank accounts could 'in no circumstances' be the subject of the final judgment . . . ." Resp. Br. at 29 (citation omitted). They cling to the statement in *De Beers* that "[a] preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally." This statement, respondents contend,

supports their view that a preliminary injunction should be available whenever the "very assets" subject to the injunction are capable of satisfying the final judgment. Resp. Br. at 28, *quoting De Beers*, 325 U.S. at 220. Thus, under respondents' regime, whenever a plaintiff seeks money damages, a preliminary injunction should be available to restrain the defendant's use of any money or other assets that can be converted into money—*i.e.*, "relief of the same character as that which may be granted finally."

Respondents' analysis nullifies the concerns raised by this Court in *De Beers*. In describing the potential harm in extending the district courts' powers to permit the issuance of a preliminary injunction to secure compliance with a potential judgment, this Court stated "it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action." *De Beers*, 325 U.S. at 222-23. Any action at law for tort or contract involving a claim for money damages is, logically, capable of satisfaction with any assets of the defendant, thus rendering those assets—in respondents' view—subject to a preliminary injunction. The *De Beers* Court thus treated as clearly improper exactly what respondents advocate—the use of injunctive relief to restrain a defendant's assets to satisfy a potential money judgment. In rejecting the preliminary injunction sought by the government in *De Beers*, the Court could have relied entirely on the attenuated connection between the requested interim relief and the ultimate relief sought in the action. The Court did not stop there, however. It explained its decision in part by observing that a ruling for the government in the circumstances of *De Beers* conceivably could be used as authority for a preliminary injunction of the kind at issue here, an outcome that the Court regarded as plainly inappropriate.

B. Equitable Relief In The Federal Courts Must Be Within The Traditional Scope Of Equity As It Existed In The English Courts Of Chancery

Contrary to respondents' contention, the equitable powers of the federal district courts are not broad, expansive, or unfettered. Resp. Br. at 33-34, 37. The cases and commentary cited by respondents merely advocate the flexible application of existing equitable powers to new factual circumstances. Resp. Br. at 31-34. Those cases, even as described by respondents, stand for the unremarkable principle that the decision whether to grant an injunction in a particular case is left to the "sound discretion" of the district courts. Resp. Br. at 31 n.14. They do not countenance any expansion of the district courts' equitable powers. Rather, the Judiciary Act of 1789 bestowed on the district courts only those equitable powers that were exercised by the Courts of Chancery.[3] *See* GMD Br. at 14-16.

Respondents suggest that the existence of equitable jurisdiction ends the inquiry. Resp. Br. at 33-34. It does

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[3] Respondents take issue with GMD's use of the phrase "inherent power" to describe the "equitable powers" of the federal courts. Resp. Br. at 32. Respondents' argument is misdirected. First, the phrases "inherent power" and "general equitable power" and "inherent equitable power" frequently have been used interchangeably by the courts. *See, e.g., De Beers*, 325 U.S. at 221 ("inherent power"); *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1526 (11th Cir. 1994) ("general equitable authority"); *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988) ("inherent equitable power"); *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978) ("inherent power"). More fundamentally, however, even if the distinction advocated by respondents is a real one, it does not aid respondents' position. The equitable authority conferred by Congress, no less than the inherent power exercised by the federal courts in controlling their dockets and the proceedings before them, is limited. In the case of the courts' equitable power, that limitation is provided by the limits that governed the English Courts of Chancery at the time that Congress used them as a model for the power to be conferred on the federal courts.

not. As this Court held in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949), cited by respondents,

> Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected. . . . The "jurisdiction" thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. . . .

This Court's decision in *Gordon v. Washington*, 295 U.S. 30 (1935), also relied on by respondents, demonstrates the Court's unwillingness to expand the district courts' equitable powers beyond those that existed in the Courts of Chancery. In *Gordon*, the Pennsylvania Secretary of Banking took possession of the assets of a financially unstable trust institution and obtained the status of a general receiver pursuant to the Pennsylvania Banking Act. *Id* at 32. Owners of participation certificates in mortgages held by the trust filed complaints in federal district court claiming that they had not received scheduled interest payments. *Id.* at 33. Plaintiffs moved successfully for the appointment of another receiver to administer the mortgage pools. *Id.* at 34. The Banking Secretary moved to dismiss the complaint and challenged the authority of the district court to appoint a receiver. *Id.* The district court denied the motion, and the court of appeals affirmed. *Id.* at 35.

This Court determined that the district court had jurisdiction over the cause and power to act as a court of equity. These findings did not end the inquiry, however. Rather, the Court held that the district court also should have determined "whether, in accordance with the accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity." *Gordon*, 295 U.S. at 36. The

Court reversed, holding that a district court may appoint a receiver to preserve and protect property pending its final disposition by the court. A court of equity cannot, however, "appoint a receiver of property of which it is asked to make no further disposition." *Id.* at 37. The reason for the limitation was that "[t]he English Chancery Court from the beginning declined to exercise its jurisdiction for that purpose." *Id.* Similarly, in this case, the district court, although possessing equitable jurisdiction, was not thereby empowered to grant preliminary injunctive relief freezing defendants' assets in aid of a potential money judgment.

C. The Preliminary Injunction Issued By The District Court Was Unavailable In The English Courts Of Chancery

Notwithstanding respondents' suggestion to the contrary (Resp. Br. at 35), the decision of the English Court of Appeal in *Mareva* marked a departure from the Chancery Court's longstanding refusal to issue a preliminary injunction to protect a potential creditor before he obtains a judgment. This country's equity jurisprudence has been characterized by the same prohibition. *See Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371 (1893) (holding that a simple contract creditor whose claims have not been reduced to judgment, and who has no express lien by mortgage, trust deed, or otherwise, cannot obtain seizure of the property of the debtor in a federal court of equity); *Scott v. Neely*, 140 U.S. 106 (1891) (holding that court of equity may not aid the enforcement of a debt unless creditor obtained judgment and attempted to execute on the judgment).

In *Mareva*, the Court of Appeal recognized that the issuance of an injunction to restrain a defendant's use of assets and thereby to preserve a potential money judgment would be permissible only upon a reconsideration of the court's prior decision in *Lister & Co. v. Stubbs*, 1890 45

Ch.D. 1 (Eng. C.A.).[4] In fact, in *Nippon Yusen Kaisha v. Karageorgis*, 1975 2 Lloyd's Rep. 137 (Eng. C.A.), decided only one month before *Mareva*, the Court of Appeal ruled that "it has never been the practice of English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them." *See also Siskina Cargo Owners v. Distos Compania Naviera, S.A.*, AC 210 HL (1979).

This Court need not (and should not) decide whether, as a matter of public policy, the federal district courts should be armed with *Mareva*-type injunctive power. Rather, only Congress can legislate an expansion of the district courts' powers. *See, e.g., Snyder v. Harris*, 394 U.S. 332 (1969). In fact, Congress has enacted legislation expanding the district courts' injunctive powers in various circumstances.[5] *See, e.g.*, Food, Drug and Cosmetics Act, 21 U.S.C. § 332 (1938); Petroleum Marketing Practices Act, 15 U.S.C. § 2805 (1978); Labor Man-

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[4] Respondents state that "[t]ellingly, Lister & Co., which was the plaintiff in that case, did not even allege that its former employee who was the defendant, was dissipating assets or was insolvent and would be unable to satisfy a money judgment if the company prevailed on its claim." Resp. Br. at 34 n.17. The court in *Lister* did not, however, deny Lister's request for an injunction because its allegations were somehow inadequate. To the contrary, if the decision in *Lister* had been predicated merely on defective pleading, that case would not have been a stumbling block for the court in *Mareva*.

[5] Respondents argue that GMD's theory would "call into question the availability of injunctions outside commercial law, in cases to redress violations of civil rights, unfair competition, trademark infringement, trade secret misappropriation, and other substantive law." Resp. Br. at 37. Nothing could be further from the truth. GMD does not challenge the availability of preliminary injunctive relief in equitable actions. Nor does GMD challenge Congress' power to legislate an expansion of the district courts' power to issue preliminary injunctive relief. Congress has not, however, enacted a *Mareva*-type statute. Until it does, the district courts should not be permitted to expand unilaterally the scope of their equitable powers.

agement Relations Act of 1947, 29 U.S.C. § 178 (1947); Fair Labor Standards Act, 29 U.S.C. § 217 (1961). The issue in this case is the extent of the powers that federal courts have been given, not what powers they ought to be given.

Even if the issue were only what is desirable, however, the answer would be far from clear. The government identifies several "functional reasons" why the district courts should be empowered "to issue preliminary injunctions under circumstances like those in this case." Gov. Br. at 19-20. But those reasons must be weighed against the serious and wide-ranging implications that such injunctive power would have in the area of creditors' rights. In ordinary business dealings, a company, even an insolvent one, is free to pay any of its *bona fide* creditors to the exclusion of others until it seeks (or is forced to seek) the protection of the Bankruptcy Code. *See* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 124 (1986). The *Mareva*-type injunctive power exercised by the district court (and advocated by respondents and the government) encourages a "race to the courthouse" that the Bankruptcy Code is designed to discourage. *See, e.g., Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989) (observing that one purpose of the Bankruptcy Code is "to prevent creditors from trying to steal a march on each other").

Affirmance of the decision below inevitably will spawn preliminary injunction motions in a large percentage of civil damage actions in the federal courts. In any case involving a financially unstable or foreign defendant, or in which the plaintiff believes it has some reason to doubt the collectibility of a potential judgment, the plaintiff will be inclined to seek an "*Alliance* injunction" to ensure that assets are available to satisfy his claim, without regard to the claims of other creditors. A defendant subject to

such an injunction may be frustrated in its ability to operate as a going concern and, ultimately, may be forced to seek the protection of the Bankruptcy Code.[6] Indeed, in such circumstances, the allegations of financial uncertainty or distress that a plaintiff would use as a basis for a preliminary injunction might well become a self-fulfilling prophecy, if the requested interim relief were granted. Such dramatic changes to the balance of power between debtors and creditors should not be implemented without the imprimatur of Congress.

III. A FEDERAL DISTRICT COURT SITTING IN DIVERSITY SHOULD NOT BE PERMITTED TO ISSUE A PRELIMINARY INJUNCTION WHEN SUCH RELIEF WOULD BE UNAVAILABLE UNDER STATE LAW

A. Petitioners' Reliance On *Erie v. Tompkins* Is Proper

Respondents argue that the "*Erie* issue" was "not fairly included in the question on which the Court granted review" and was "neither pressed nor passed on by any court below." Resp. Br. at 42, 43. The question whether the federal district court in this case—which is and always has been a diversity action, according to respondents' own allegations—had the authority to issue a preliminary injunction under the circumstances presented here was the very question presented in GMD's petition for a writ of certiorari and the very question ruled on by the court of appeals.

At all times, GMD has challenged the power of the federal district courts to issue a preliminary injunction that prohibits a defendant from using its assets and thus seeks to preserve funds for the purpose of satisfying a

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[6] The deleterious effects of such an injunction would be particularly severe if, as respondents contend, any damages suffered during the pendency of the wrongful injunction are not compensable should the plaintiff eventually prevail on the merits. Resp. Br. at 20.

potential money judgment.[7] In its opening brief on the merits, GMD argued, first, that the federal courts generally lack such power and, second, that at minimum federal courts lack such power when they are sitting in diversity in a state whose courts are not authorized to grant such interim relief. The second argument is a subset of the first and is therefore included within the question presented for review. *See* this Court's Rule 14.1(a); *see also* this Court's Rule 24.1 (in a brief on the merits, "[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari"). There is no question that this is a diversity case or that *Erie* is applicable. Nor is there any question that the court of appeals considered whether the preliminary injunction could issue under New York law. The court of appeals expressly held that it could not. Pet. App. 8a. What respondents term the "*Erie* issue" is merely a part of the argument that GMD has pressed from the inception of

[7] GMD argued in its Memorandum of Law in Opposition to Plaintiffs' Application for a Preliminary Injuncton that:

> this Court does not have the power under Rules 64 and 65 of the Federal Rules of Civil Procedure to grant an injunction freezing defendants' assets that are unrelated to the underlying litigation.

The question presented in GMD's brief to the court of appeals was:

> [d]id the District Court exceed its authority by issuing a preliminary injunction prohibiting the Defendants from using assets which are unrelated to the pending litigation and are held outside of the court's jurisdiction for the purpose of securing an eventual judgment that may be obtained by Plaintiffs?

The question presented in GMD's Petition for Writ of Certiorari was:

> [i]s a United States District Court empowered to issue a preliminary injunction prohibiting a defendant from transferring or assigning assets unrelated to the plaintiff's underlying claim and held outside of the court's jurisdiction in order to ensure that funds will be available to satisfy a potential money judgment?

this lawsuit, namely, that the district court was not authorized to enter the relief sought by respondents.

B. New York Law Does Not Authorize The Preliminary Injunction Issued By The District Court

Respondents now contend for the first time that the preliminary injunction issued by the district court was permissible under New York law. The court of appeals held otherwise. Pet. App. 8a ("[u]nder New York law, 'a preliminary injunction is . . . unavailable in an action for a sum of money only' ").[9] Neither in the district court nor in the court of appeals did respondents challenge GMD's claim that the preliminary injunction was unavailable under New York law. In fact, the court of appeals observed that "[a]ll parties acknowledge that Judge Martin could not have enjoined the use of the Toll Road Notes under Rule 64 (and New York's injunction statute) because the Investors sought only monetary damages." *Id.* All of the cases cited by respondents here involve circumstances in which (a) the subject of the preliminary injunction was the same *res* or "thing" as was the subject of the plaintiff's underlying claim (*see Zonghetti v. Jeromack*, 541 N.Y.S.2d 235 (App. Div. 2d Dep't 1989) (preliminary injunction issued to restrain defendant's sale of assets purchased with funds converted from plaintiff); *Ma v. Lien*, 604 N.Y.S.2d 84 (App. Div. 1st Dep't 1986) (preliminary injunction issued to escrow proceeds of disputed lottery ticket); *Pando v. Fernandez*, 508 N.Y.S.2d 8 (App. Div. 1st Dep't 1986) (same); *R. Prescott & Son, Inc. v. Nye*, 228 N.Y.S. 156 (App. Div. 3d Dep't 1928) (preliminary injunction issued to prevent insurance company from

[9] This Court ordinarily accepts the interpretation of local law by the court of appeals. *See, e.g., Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 529-30 (1958). This is especially true where, as here, the author of the opinion is a renowned commentator on the state law at issue. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949); McLaughlin, J., Practice Commentaries, 7B McKinney's C6301:1 at 209 (1980).

paying insurance funds in action to foreclose a lien on the funds); *Air Traffic Conference v. Downtown Travel Ctr., Inc.*, 383 N.Y.S.2d 805 (Sup. Ct. N.Y. Co. 1976) (preliminary injunction issued to restrain defendant from dissipating funds held in trust for plaintiff); *Rolnick v. Rolnick*, 230 N.Y.S.2d 789 (Sup. Ct. Queens Co. 1962) (preliminary injunction issued to prevent defendant from transferring stock subject to action to impose constructive trust)), or (b) the preliminary injunction was issued pursuant to some statutory provision other than C.P.L.R. § 6301. *See H.I.G. Capital Management, Inc. v. Ligator*, 650 N.Y.S.2d 124 (App. Div. 1st Dep't 1996) (preliminary injunction issued pursuant to C.P.L.R. § 7502(c)).

C. Fed. R. Civ. P. 65 Does Not Authorize The Issuance Of The Preliminary Injunction

Respondents contend, without any supporting case law, that "Rule 65 authorized the preliminary injunction entered by the district court below" and, accordingly, *Erie* is not implicated. Resp. Br. at 46. The court of appeals did not, however, predicate its affirmance of the district court's order on Rule 65 but rather relied on the court's "general equitable power." Pet. App. 12a. The court of appeals held, and GMD agrees, that "Federal Rule of Civil Procedure 65 establishes the procedure for securing preliminary injunctive relief in civil actions." *Id.* at 7a. Even the cases cited by respondents recognize that "Rule 65 does not provide explicit guidance as to the factors to be considered when making a preliminary injunction decision." *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 102 (6th Cir. 1991). Accordingly, the question is whether, under *Erie*, the "general equitable powers" of the federal district courts should trump a conflicting state law. They should not.

D. The Federal District Courts Should Not Be Permitted To Apply Federal Judge-Made Law In Contravention Of New York State Law

Respondents argue that the general equitable powers of the federal district courts should supersede conflicting state law because "[p]reliminary injunctions are a provisional remedy and do not determine the ultimate outcome of litigation."[10] Resp. Br. at 47. Respondents fail, however, to cite a single decision of this Court in which federal judge-made law was held to trump conflicting state law in a diversity case. To the contrary, this Court has held that the question of " '[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." *See Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 219 (1997), *quoting Wallis v. Pan Am Petroleum Corp.*, 384 U.S. 63, 68 (1966).

This Court's *Erie* jurisprudence mandates that a conflict between federal judge-made law and state law be resolved with reference to the twin aims of *Erie*—discouraging forum shopping and promoting the equitable administration of the laws. *See* GMD Brief at 24, 28. Respondents seek to counterbalance these goals with the "federal interest in having uniform equitable remedies and entering effectual judgments." Resp. Br. at 11. But *Erie* permits no such balancing. The whole point of *Erie* and

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[10] Respondents cite a number of cases in support of their claim that "lower federal courts agree that the decision whether to issue a preliminary injunction is one of procedure." Resp. Br. at 47 n.27. An equal abundance of authority disagrees. *See, e.g., Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 647 (9th Cir. 1988); *Franke v. Wiltschek*, 209 F.2d 493, 496-97 (2d Cir. 1953); *Kaiser Trading Co. v. Associated Metals & Minerals Corp.*, 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) (availability of preliminary injunction, because of substantive importance, determined by state law); 13 James Wm. Moore et al., Moore's Federal Practice § 65.07 (3d ed. 1998).

its progeny is that, in our federal system, the goal of maintaining uniformity of law within a state must take precedence over the uniform application of law in the federal district courts.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 103 (1945), this Court recognized that *Erie* rejected the "attractive vision of a uniform body of federal law" embodied in *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842). Respondents once again seek to entice the Court with that vision. *Erie*, however, stands for the proposition that "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *Id.* at 112. This Court should reject respondents' invitation to make preliminary injunctive relief available in a diversity action in federal district court in New York in circumstances in which the same relief could not be rendered by a state court judge in the same jurisdiction.

CONCLUSION

For all the foregoing reasons, and those in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., ET AL.,
PETITIONERS

v.

ALLIANCE BOND FUND, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a federal district court has the power to enjoin a defendant that is threatened with insolvency, or is likely to dissipate its assets, from transferring assets that are not the specific subject of the suit in which the injunction is entered, if such an order is necessary to preserve the plaintiff's ability to collect a money judgment that is likely to be entered in its favor.

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INTEREST OF THE UNITED STATES

This case involves the authority of a federal district court to issue a preliminary injunction prohibiting a defendant from transferring or dissipating assets pending final judgment where the suit seeks monetary relief, but not necessarily the return or transfer of specific monetary assets covered by the injunction. Preserving the ability of federal courts to render enforceable monetary judgments is a matter of considerable importance to the smooth flow of interstate and foreign commerce. In addition, the United States often seeks damages, penalties, or other monetary relief from parties who have violated federal law, and who may attempt to conceal or dissipate their assets. The United States accordingly has a direct interest in the continued recognition

of courts' equitable authority to grant appropriate preliminary relief to ensure the enforceability of money judgments.

STATEMENT

1. Petitioner Grupo Mexicano de Desarrollo, S.A. (GMD), is the holding company for a consortium of Mexican construction firms. The remaining petitioners are subsidiaries of GMD. Pet. ii; Pet. App. 3a. From 1990 to 1994, petitioners participated in a program under which the Mexican government granted concessions to operate intercity toll roads to companies that would arrange private financing for construction of the roads. The concessionaires then hired petitioners and others to build the roads. Revenues from the toll roads fell below expectations, however, and the concessionaires were ultimately unable to pay the construction bills rendered by petitioners and others. Pet. App. 3a; Pet. 4.

In early 1994, petitioner GMD issued $250 million of unsecured notes, guaranteed by the other petitioners (the GMD Notes). Pet. App. 3a. Respondents in this case are United States-based investment funds that purchased some $75 million of the GMD Notes. Later, as the concessionaires failed to pay their bills, petitioners experienced serious financial difficulties. In its annual report filed with the Securities and Exchange Commission in June 1997, GMD admitted that its liabilities exceeded its assets. In August 1997, both GMD and its guarantors defaulted on their obligation to make a periodic interest payment on the notes. *Id.* at 3a-4a.

Some days later, the Government of Mexico implemented a Toll Road Rescue Program, under which it assumed control of the roads and promised to issue government-guaranteed notes (the Government Notes) to petitioners and other construction contractors to compensate them for a portion of the amount left unpaid by the concessionaires. In its financial statements for the third quarter of 1997, GMD

disclosed that it expected to receive some $309 million worth of Government Notes. Pet. App. 4a; Pet. 4-5.

Apart from the GMD Notes, petitioners owed more than $450 million to other creditors, including the Mexican government, Mexican financial institutions, trade creditors, and former employees. Petitioners undertook negotiations with their creditors, including respondents, to settle their outstanding financial obligations. GMD's third-quarter statements for 1997 disclosed that it had a negative net worth of some $214 million, and that it had already assigned its right to receive some $117 million worth of Government Notes to satisfy Mexican tax liabilities and the cost of severance packages for terminated employees. Respondents thereafter exercised their contractual right (in view of petitioners' default) to demand immediate payment on the GMD Notes, and brought this suit in the United States District Court for the Southern District of New York to enforce that demand, seeking damages for breach of contract. Pet. App. 4a- 5a.

Respondents' complaint also alleged that GMD was either insolvent or in immediate danger of becoming insolvent; that the Government Notes were its "most significant liquid asset"; that it was in the process of favoring Mexican creditors over others, including respondents, by assigning its right to receive the government notes; and that distribution of the Government Notes to favored creditors would irreparably harm respondents by "making any judgment for breach of contract rendered in [respondents'] favor uncollectible." J.A. 26-30. On the basis of those allegations, respondents asked the district court to issue a preliminary injunction prohibiting petitioners from "dissipating, disbursing, transferring, conveying, encumbering or otherwise disposing of" the Government Notes pending resolution of their suit. J.A. 31.

The district court granted a temporary restraining order and set a hearing on respondents' request for a preliminary injunction. Pet. App. 5a. At that hearing, petitioners con-

ceded that they had already assigned, to creditors other than respondents, considerably more than $200 million of the Government Notes that they expected to receive. *Id.* at 5a-6a. Respondents also produced evidence suggesting that petitioners planned to make additional assignments, leaving only $5.5 million worth of Government Notes available to satisfy debts to non-Mexican creditors, including the $75 million debt to respondents. *Id.* at 6a, 32a-34a. After argument (see *id.* at 29a-54a; J.A. 70-79), the district court concluded that respondents were "almost certain" to prevail on the merits of their contract claim. Pet. App. 26a. The court also found that GMD had "stated that it plan[ned] to use the Government Notes to satisfy its Mexican creditors to the exclusion of [respondents] and other holders of the [GMD] Notes," and that, in light of petitioners' financial condition and its assignments to other creditors, a judgment in favor of respondents in the present action "[would] be frustrated." On that basis, the court held that respondents had "demonstrated that, in the absence of the requested preliminary injunction, they [would] suffer irreparable injury and [would] not have an adequate remedy at law." *Ibid.* The court accordingly granted the preliminary injunction. *Ibid.* At petitioners' request, however, the court made clear in its order that the injunction did not "prohibit [petitioners] from commencing any insolvency proceedings under any applicable law." *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 1a-19a. The court rejected (*id.* at 6a-9a) petitioners' argument that Rule 64 of the Federal Rules of Civil Procedure—which permits parties in federal court to invoke pre-judgment remedies (such as arrest, attachment or garnishment) "providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action * * * under the circumstances and in the manner provided by the law of the state in which the district court is

held" (Fed. R. Civ. P. 64)—impliedly precludes a district court from granting any other form of preliminary relief unless the plaintiff asserts a specific equitable interest in a particular asset held by the defendant. The court held instead that the remedies made available by Rule 64 and the court's general equitable power to grant preliminary injunctive relief, in accordance with the procedures set out in Rule 65, "to preserve the status quo between parties pending a final determination of the merits" (Pet. App. 7a), are "complementary, not mutually exclusive" (*id.* at 6a). Although the court acknowledged that New York law did not authorize the issuance of a preliminary injunction in "an action for a sum of money only," and that respondents could not attach petitioners' interest in property held outside the State, it held that those circumstances did not "render the court powerless." *Id.* at 8a. Rather, "[i]f the court has personal jurisdiction over the defendant, and use of the court's injunctive power is appropriate, the court may order the defendant to bring the assets to New York or restrain the use of the assets." *Ibid.*

The court of appeals recognized that this Court has not squarely addressed the question "whether the district court may issue an injunction to protect the plaintiff's right to recover monetary damages when there is a threat of defendant's insolvency or its dissipation of assets *not* directly involved in the pending litigation." Pet. App. 9a. The court nonetheless "read [this Court's] precedents to suggest that a preliminary injunction should be available under those circumstances." *Ibid.*

The court rejected petitioners' assertion that *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), "bars the use of preliminary injunctions to freeze unrelated assets in any case seeking only monetary relief." Pet. App. 9a-10a. It agreed instead with the Third Circuit's conclusion that *De Beers* held only that "a defendant's money

may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs," and was therefore "simply inapplicable to cases in which a litigant seeks money damages." *Id.* at 10a-11a (quoting *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 197 (1990)). Moreover, after analyzing this Court's decisions in *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940), and *United States* v. *First National City Bank*, 379 U.S. 378 (1965), the court concluded that they "endorse[d] the district court's exercise of general equitable power to ensure the preservation of an adequate remedy." Pet. App. 12a.

In view of this Court's decisions, its own precedents, and cases from other circuits, the court of appeals "join[ed] the majority of circuits in concluding that a district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment." Pet. App. 15a (quoting *In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995)). Although the court noted "[this] Court's warning in *De Beers*" that injunctive relief should not be "too freely granted," it remained "confident" that "[t]he defendant's rights are adequately protected [by] the traditional requirements for obtaining equitable relief[, which] must be met before a district court may issue an injunction." *Ibid.*

Finally, the court of appeals determined that the district court did not abuse its discretion in issuing a preliminary injunction under the circumstances presented in this case. Pet. App. 15a-18a. Although it recognized that harm ordinarily is not "irreparable," as is required to justify preliminary relief, unless it is "a kind of injury for which a money judgment cannot compensate," the court held that a "district

court may properly find that the threatened injury would be irreparable if, in the absence of an injunction, the movant would be unable to collect such a judgment." *Id.* at 17a. Concluding that the district court's factual findings were supported by the record, and were sufficient to justify a grant of preliminary relief, the court of appeals affirmed the entry of the preliminary injunction. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

Federal district courts now exercise all of the powers traditionally possessed by the historically separate courts of law and equity. Petitioners contend that because a claim for damages for breach of contract would once have been brought in a court of law, whereas an injunction restraining the dissipation of assets could only have been obtained from a court of equity, the district court here lacked the power to issue such an injunction on a preliminary basis, before it had the opportunity to reach and decide respondents' legal claim on the merits. That contention is not without some historical force, although there were exceptions to the general rule that might have been applicable in a case such as this. In the modern context, however, there is no functional reason to invoke a rule that, if applicable at all, had its origin in a system of separate and jealously independent courts that has long since ceased to exist.

The relevant historical principles of equity are, instead, those that govern the granting of any form of injunctive relief. Those principles, and particularly the requirement that in the absence of an injunction the moving party will likely suffer unjust and irreparable harm, will serve to preclude any unwarranted use of preliminary injunctions in this context, as in any other.

Petitioners suggest that the result they advocate is compelled by Rule 64 of the Federal Rules of Civil Procedure and is supported by this Court's cases. But Rule 64 merely

makes certain state-law prejudgment remedies available in federal court; it does not purport to prohibit the exercise, under Rule 65, of a district court's general equitable powers in situations in which the remedies incorporated by Rule 64 prove unavailable or inadequate. And this Court's cases, while they do not resolve the issue, support the position advocated by respondents.

Finally, we note that the federal government often seeks various forms of monetary relief through civil actions, and that the ability to obtain prejudgment orders preventing defendants from dissipating or secreting assets is therefore important to the effective enforcement of federal law. Whatever the outcome of this case with regard to the private parties involved, we respectfully request that the Court take account of the important public interest in the availability of prejudgment orders in government litigation.

ARGUMENT

A FEDERAL COURT MAY ISSUE A PRELIMINARY INJUNCTION TO PROTECT A PLAINTIFF'S RIGHT TO RECOVER MONETARY RELIEF WHEN ENFORCEMENT OF THE COURT'S FINAL JUDGMENT WILL OTHERWISE LIKELY BE FRUSTRATED BY THE DEFENDANT'S INSOLVENCY OR DISSIPATION OF ASSETS

A. After The Merger Of Law And Equity, There Is No Functional Justification For Denying District Courts The Power To Grant Equitable Relief To Ensure The Ultimate Enforceability Of A Judgment For Money Damages

A modern federal district court combines at one bench all of the powers traditionally exercised, in Anglo-American practice, by the once-separate courts of "law" and "equity." See generally Fed. R. Civ. P. 1. Those bringing civil causes before the court now do so under "one form of action." Fed.

R. Civ. P. 2. One result of those procedural developments is that a party seeking a monetary recovery that would once have been awarded by a court of law, like the contract damages at ultimate issue in the present case, may without difficulty include in its pleadings a request for a form of preliminary relief, such as an injunction requiring the defendant to conserve, *pendente lite*, assets not themselves otherwise subject to the jurisdiction of the court, that might once have been awarded only by a chancellor in equity. We submit that a district court has the power to issue such an injunction in appropriate circumstances, in order to protect both the interests of the litigants before it and its own ability to render a judgment that may be effectively enforced.[1]

On the facts of this case, as described by the courts below (Pet. App. 3a-6a, 23a-26a), respondents were presented with a simple practical problem. They had invested a significant amount of money in bonds issued by a foreign corporation, which had defaulted on its obligations. The issuer had agreed to submit itself to the jurisdiction of United States courts for purposes of enforcement of those obligations, but it had no assets located within the jurisdiction of those courts. See Pet. Br. 2 n.2. Moreover, respondents had reason to believe that the issuer had only one substantial liquid asset, which was markedly insufficient to cover all of its

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[1] While this case was pending on appeal, the district entered judgment in favor of respondents for a sum certain, and ordered petitioners to assign to respondents receivables or Government Notes of sufficient value to satisfy the judgment. Pet. App. 58a-59a; J.A. 110-112. The court further converted the preliminary injunction restraining transfer or dissipation of the Government Notes into a permanent injunction pending compliance with the assignment order. Pet. App. 59a; J.A. 112. Petitioners appealed those orders (J.A. 113), and the court of appeals stayed the assignment order pending appeal (J.A. 115-116). Although respondents suggested to the court of appeals that petitioners' challenge to the preliminary injunction had become moot, the court rejected that suggestion. J.A. 117-118; see also Pet. 10; Br. in Opp. 4 n.3. We do not address that question.

outstanding debts; and that it was dissipating that asset by making preferential transfers that would fully discharge its debts to certain favored creditors, while leaving respondents and other creditors with worthless paper claims.

Faced with those circumstances, respondents invoked the jurisdiction of a federal district court.[2] The core of their complaint was a straightforward "legal" claim seeking money damages for breach of contract. See J.A. 30. In order to protect their ability to recover on that claim, however, and on the basis of their detailed allegations concerning the financial condition of the issuer and its ongoing transfer of Government Notes to other creditors, respondents also asked the court to exercise its equitable authority to enjoin the defendant from making further such transfers, pending the reduction of respondents' contract claim to an enforceable judgment. *Ibid.*

Petitioners concede (Br. 11) that a pre-judgment restraint on a defendant's use of assets may issue "to preserve a final equitable remedy of restitution or constructive trust when the plaintiff has an equitable claim to a specific *res* or thing in the possession of the defendant." And petitioners do not present any issue concerning a district court's powers of enforcement once it has rendered a decision on the merits of a legal claim.[3] They contend, however, that because respondents' contract claim is one that would historically have been brought in a court of law, whereas a preliminary injunction

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[2] There is no dispute that the district court had both personal and subject-matter jurisdiction. See Pet. Br. 2 n.2.

[3] See Pet. App. 33a-34a; Fed. R. Civ. P. 69(a); N.Y. C.P.L.R. 5222 (McKinney 1998) (restraint on defendant's "sale, assignment, transfer or interference with" assets, pending satisfaction of judgment, issuable as matter of course), 5229 (court may enjoin defendant from transferring assets as soon as verdict or decision has been rendered, without awaiting formal judgment). See also *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166, 167 (1867); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825).

could only have been obtained from a court of equity, the district court here lacked the power to restrain petitioners' use of the Government Notes before it had reached and decided respondents' contract claim on the merits.

That contention is not without some historical force. It is true, for instance, that traditionally a "creditor's bill," seeking equity's aid in the enforcement of a legal debt, would generally be entertained only if the debt had been confessed, or if the creditor had already obtained a legal judgment establishing the validity of his claim and attempted to execute that judgment. See, *e.g.*, *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U.S. 371, 378-381 (1893); *Scott* v. *Neely*, 140 U.S. 106, 113 (1891); *Smith* v. *Railroad Co.*, 99 U.S. 398, 401 (1878); *Case* v. *Beauregard*, 99 U.S. 119, 125, 129 (1878); 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1415 (5th ed. 1941) (Pomeroy (5th ed.)). As this Court explained, however, such requirements were "only evidence that [a plaintiff's] legal remedies ha[d] been exhausted, or that he [was] without remedy at law. They [were] not the only possible means of proof. The necessity of resort to a court of equity [might] be made otherwise to appear. Accordingly the rule, though general, [was] not without many exceptions. Neither law nor equity require[d] a meaningless form." *Case* v. *Beauregard*, 101 U.S. 688, 690 (1879); see 5 J. Pomeroy, *Equity Jurisprudence and Equitable Remedies* § 2307, at 5114 n.75 (4th ed. 1919) (quoting *Austin, Nichols & Co.* v. *Morris*, 23 S.C. 393, 402 (1885)). Pomeroy notes two such exceptions that might have been relevant in a case like this one: "Whether the debtor's insolvency [would] obviate the necessity of proceeding at law * * * [was] unsettled," and "under certain circumstances equity [would] lend its aid to set aside fraudulent conveyances of property and apply it to a creditor's demands, by a proceeding that [might] be called 'equitable attachment,' without a judgment having been obtained, where the debtor ha[d] absconded, or removed from

or reside[d] out of the state[,] * * * and to reach money of an absconding debtor not subject to garnishment at law." Pomeroy (5th ed.) § 1415, at 1067 n.12; see *Case*, 101 U.S. at 690-692.

Our point is not to resolve, or to suggest that this Court resolve, the question whether a court sitting in equity a hundred or more years ago would have exercised its considerable discretion to apply (or create), on the facts of this case, an exception in favor of respondents to a rule that might have favored petitioners. It is rather to suggest that any such debate is an arid one. In particular, it is well to recall that many prudential restrictions on the use of equity powers arose in practice from the historical circumstance that actions at law and suits in equity were originally entertained by different courts, which were at once both jealous of their own prerogatives and conscious of the need to preserve comity by observing certain boundaries. See, *e.g.*, 1 D. Dobbs, *Law of Remedies* § 2.5(1), at 123-124 (2d ed. 1993) ("Equity's expansive power ignited opposition from law court judges * * *. When the equity courts did *not* create a new right, but instead merely added a remedy to rights already recognized by the law courts, they prudently stated the" rule that equity would not intervene unless legal remedies were inadequate.). Thus, for example, it is not surprising that courts of equity would have been reluctant to grant pre-judgment injunctions to aid the collection of legal debts, where doing so might trench unacceptably on the jurisdiction of the law courts to decide which debts would be recognized as "legal" and which would not, and to afford the primary means for the securing and enforcement of their own judgments.

The functional need for such rules of comity lessened considerably when, as in the federal judicial system, law and equity came to be administered by the same courts, albeit through separate forms of action. It receded still further

when the two were essentially merged into one civil action proceeding under one common set of procedural rules. As a result of that merger, federal "courts now can give specific relief without being concerned about potential interference with another independent system of courts or the niceties of equity jurisdiction." 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1043, at 143 (2d ed. 1987). Indeed, ideally, "the merger of law and equity and the abolition of the forms of action furnish a single uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to give him whatever relief is appropriate and just." *Id.* at 138 & n.1.

There would be little functional reason now to adopt a rule —the unavailability of a pre-judgment injunction to preserve the ability to render an effective legal judgment—the major effect of which is to police a boundary that long since ceased to exist. That conclusion is, moreover, reenforced by the difficulty of ascertaining whether, in pre-merger practice, the "rule" that petitioners invoke would or would not actually have been applied under any given set of circumstances. The relevant question today is whether it makes any sense to deny a federal district court, fully invested with both legal and equitable powers, the authority to invoke an otherwise appropriate pre-judgment remedy, simply because of the different historical labels attached to that remedy and to the lawsuit's central claim. The answer is that in the absence of some compelling authority, it does not.

We do not mean to suggest that history is irrelevant to the proper modern application of equitable principles. It is not, any more than the history of tort or contract law is irrelevant to the understanding and application of their respective modern rules. In particular, the traditional requirements for the issuance of any preliminary injunction apply equally in this context. Thus, in order to obtain a pre-judgment order restraining a defendant from dissipating its

assets, a private plaintiff will always be required to show not only that it is likely to succeed on the merits of its claim, but also that it will suffer "irreparable injury" in the absence of an injunction; and the terms of the injunction must be tailored to serve its purposes without imposing undue hardship on the defendant. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); Pet. App. 16a; *Hoxworth* v. *Blinder, Robinson & Co.*, 903 F.2d 186, 199 (3d Cir. 1990) (reversing grant of preliminary injunction because district court did not "match the scope of its injunction to the most probable size of the likely judgment"). The irreparable injury requirement, in particular, serves as a significant check on the availability of preliminary relief where a plaintiff seeks primarily money damages, because, as the court of appeals noted in this case (Pet. App. 16a-17a), an injury is rarely "irreparable" if it can be remedied by a money judgment. See *Sampson* v. *Murray*, 415 U.S. 61, 89-92 (1974).[4]

Moreover, even where the prerequisites for relief are met, the decision whether or not to issue a preliminary injunction, and on what terms, rests in the sound discretion of the district court. See, *e.g.*, *Doran*, 422 U.S. at 931-932; *Brotherhood of Locomotive Eng'rs* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531-532 (1960); *Yakus* v. *United States*, 321 U.S. 414, 440 (1944); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944). In exercising that discretion, the district court

[4] As the court also noted, however, the requirement may be met where, as here, the plaintiff can make a persuasive showing that, in the absence of an injunction, any ultimate judgment is likely to be uncollectible. Pet. App. 17a; see also, *e.g.*, *Hoxworth*, 903 F.2d at 197; *American Hosp. Supply Corp.* v. *Hospital Prods. Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986); cf. *Sampson*, 415 U.S. at 92 n.68 (although temporary loss of wages because of wrongful discharge would not normally be "irreparable" in view of possible monetary recovery, "cases may arise in which the circumstances * * * may so far depart from the normal situation that irreparable injury might be found").

may and must take appropriate account of the special circumstances that attend each case. See *Yakus*, 321 U.S. at 440 (equity court should seek to "avoid * * * inconvenience and injury so far as may be, by attaching conditions to the award"); *Hecht Co.*, 321 U.S. at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

In this case, for example, the fact that petitioners and their assets were located outside the United States reenforced, on the one hand, respondents' argument that other prejudgment remedies (such as attachment of assets within the court's jurisdiction) would not be effective to safeguard their interest; but it also required judicial sensitivity in framing an injunctive order to avoid any unnecessary interference with obligations imposed on petitioners under Mexican law. See, *e.g.*, *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 384-385 (1965) (noting need for sensitivity and flexibility where freeze order affected activity abroad); compare *Meredith* v. *Winter Haven*, 320 U.S. 228, 235-236 (1943) (because exercise of equity jurisdiction is discretionary, federal courts may decline to exercise it in various situations touching the government or laws of the States). Similarly, because respondents' allegations that petitioner GMD was insolvent, and that it was making preferential transfers of its assets to other creditors, raised obvious questions about the possibility of formal insolvency proceedings, it would have been inadvisable for the district court to enter an injunction that might have been deemed to interfere with the commencement or orderly conduct of such proceedings. The district court took account of both the international and the insolvency aspects of this case, by declining respondents' request that it order petitioners to create a trust under Mexican law, and by accepting respondents' suggestion to

include in the injunction a provision specifying that it did not prohibit petitioners from commencing insolvency proceedings "under any applicable law." Pet. App. 27a; see *id.* at 30a-31a, 36a-39a, 44a, 51a; J.A. 72-75, 77, 79.[5]

Historical principles that continue to have present application—such as those requiring a showing of irreparable harm and directing the district court to exercise sound discretion in determining whether or not to grant, and how to frame, a preliminary injunction—generally also continue to have articulable functional justifications. See, *e.g.*, *American Hosp. Supply Corp.* v. *Hospital Prods. Ltd.*, 780 F.2d 589, 593-594 (7th Cir. 1986). Petitioners offer no such justification in support of the rule for which they argue here. By contrast, one may easily enumerate various functional reasons for confirming the power of courts to issue preliminary injunctions under circumstances like those in this case. They would include: simplicity and uniformity of procedure; preservation of the court's ability to render a judgment that will prove enforceable; prevention of inequitable conduct on the part of defendants; avoiding disparities between defendants that have assets within the jurisdiction (which would be subject to pre-judgment attachment "at law") and those that do not; avoiding the necessity for plaintiffs to locate a forum in which the defendant has substantial assets; and, in an age of easy global mobility of capital, preserving the attractiveness of the United States as a center for financial transactions like the issuance of the bonds at issue in this case, by assuring potential creditors that they will be able to obtain

[5] The court also heard argument at some length concerning the limits of the injunction, and whether it would be desirable to include a provision allowing for disbursements in the ordinary course of business. See generally Pet. App. 38a-54a; J.A. 70-79. The court made clear that it stood ready to entertain requests from petitioners, on an emergency basis if necessary, should there be a need to modify the terms of the injunction. See J.A. 77-79.

effective remedies in our courts in the event of a default. See also 11A C. Wright et al., *Federal Practice and Procedure* § 2947, at 123 (2d ed. 1995) ("[T]he most compelling reason in favor of entering [a preliminary injunction] is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.").[6] In this case, function favors respondents.

B. Neither The Federal Rules Nor This Court's Cases Deny District Courts The Power To Enter Preliminary Injunctions In Actions For Money Damages

Petitioners argue that adoption of the rule they advocate here—whatever its functional disadvantages—is compelled either by Rule 64 of the Federal Rules of Civil Procedure (Br. 18-20), or by this Court's cases (Br. 10-14). Neither authority can bear the weight petitioners would place upon it.

1. Petitioners contend that Rule 64 establishes the state-law remedies it incorporates as the exclusive means of obtaining prejudgment relief in federal court "for the purpose of securing satisfaction of the judgment ultimately to be entered in the action." As they concede (Br. 18), however, nothing in the text of the Rule conveys that meaning. The Rule's language is, instead, permissive and supplementary, providing that the slate of ordinary prejudgment remedies provided by local law, with which district judges and many of the lawyers who practice before them are presumptively most familiar, shall also be "available" for use in the federal

[6] It is instructive that, as petitioners note, the English chancery courts are now authorized to grant injunctions of the sort at issue here. See Pet. Br. 16-17 & n.8. That change confirms both the functional value of such injunctions, particularly in commercial litigation (see *id.* at 17 n.8), and "the inestimably valuable flexibility and capacity for growth and adaption to newly emerging problems which the principles of equity have supplied in our legal system." *Bereslavsky* v. *Caffey*, 161 F.2d 499, 500 (2d Cir.), cert. denied, 332 U.S. 770 (1947).

venue. Fed. R. Civ. P. 64. The Rule nowhere suggests that the state remedies so incorporated are to be exclusive of any federal remedy that may otherwise apply; indeed, to the contrary, it provides that federal law, and the Federal Rules, *continue* to apply in the federal action, and specifically notes that certain procedures that may be required by state law, such as the bringing of a separate action to secure a particular remedy, do not apply. *Ibid.*

We may assume that when one of the remedies made available by Rule 64 is provided by the relevant state law and is adequate to its purpose, parties seeking a money judgment in federal court ordinarily must avail themselves of that remedy and comply with its attendant forms and procedures. But if a state-law remedy is unavailable or inadequate under the circumstances of a particular case, a federal court is not left powerless to protect the parties before it and its own ultimate ability to enter an effective judgment. See 28 U.S.C. 1651 (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *Hoxworth*, 903 F.2d at 197 n.15; cf. *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825) (Marshall, C.J.) (All Writs Act applies to both pre- and post-judgment orders). It is wholly consonant with tradition to observe that where the prejudgment remedies provided under Rule 64 prove unavailable or inadequate, a party may turn to equity—in this case, to the judicial injunctive power recognized by Rule *65* of the Federal Rules — to seek and obtain appropriate judicial protection.[7]

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[7] The United States ordinarily does not follow state procedures when it seeks a prejudgment seizure, because the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. 3001 *et seq.*, by its terms "provides the exclusive civil procedures for the United States * * * to obtain, before judgment on a claim for a debt, a remedy in connection with such claim." 28 U.S.C. 3001(a). The term "debt" is defined broadly to include most monetary claims, including claims for fines, penalties, or restitution. 28 U.S.C. 3002(3). The FDCPA does not, however, "supersede or modify the operation of * * * any Federal law authorizing, or any inherent authority of a court to provide, injunctive relief." 28 U.S.C. 3003(c)(7). Where the FDCPA does not apply or does not provide an effective remedy—for example, where a party's suspected concealment of assets makes it impossible for the government to provide "a reasonable description of the property to be attached," 28 U.S.C. 3102(c)(3)(E)—the United States must rely on the All Writs Act, 28 U.S.C. 1651, or on the "inherent authority of a [district] court to provide[] injunctive relief," as permitted by Section 3003(c)(7), in endeavoring to protect the ultimate enforceability of a potential monetary award.

2. Although they recognize (Br. 10) that the question is an open one, petitioners argue that this Court's decisions "suggest" (Br. 14) that the district court lacked the authority to grant the preliminary relief at issue here. Like the court of appeals (Pet. App. 9a), we find in the same cases the opposite suggestion.

Petitioners rely principally on *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), which reversed a grant of preliminary relief entered in an action by the United States against several foreign corporations alleging violation of the antitrust laws. The order obtained by the government prohibited the defendants from "withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States 'until such time as [the trial court] shall have determined the issues of this case and defendant corporations shall have complied with its orders.'" *Id.* at 215. The Court observed, however, that the only *permanent* relief authorized by the laws under which the government brought suit was an injunction against "future continuance of actions or conduct intended to monopolize or restrain commerce." *Id.* at 219-220. The Court concluded that the injunction that had issued was impermissible because, although "[a] preliminary injunction is 'always appropriate to grant intermediate relief of the same character as that which may

be granted finally," under the circumstances an injunction prohibiting the transfer of assets "deal[t] with a matter lying wholly outside the issues in the suit," and interfered with the defendants' use of "property which in no circumstances [could] be dealt with in any final injunction that [might] be entered." *Id.* at 220.

The Court noted that the preliminary injunction purportedly sought "to provide security for the performance of a future order which may be entered by the court." 325 U.S. at 219. Because, however, the "future order" authorized as final relief in the case would not include an order to pay money, restraint of the defendants' assets could only be defended "as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt." *Id.* at 220. The asserted need for the injunction was therefore necessarily predicated on the likelihood not only that the government would prevail on the merits, but also that the defendants would violate the court's final injunction, "that a proceeding may be instituted for contempt and will result adversely to the defendants[,] that a fine may be imposed[,] that the defendants may neglect or refuse to pay the fine[, and] that an execution issued for the collection of the fine * * * may be ineffectual to seize property or money of the defendants in liquidation of the fine." *Id.* at 219. If, the Court remarked, a preliminary injunction could issue to insure against such a speculative potential harm, then:

> Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

Id. at 222-223.

As the Court below recognized, *De Beers* held only that "a defendant's money may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs." Pet. App. 10a-11a (quoting *Hoxworth*, 903 F.2d at 197). It is therefore quite different from this case, in which respondents did seek (and, indeed, obtained) money damages, and where a prejudgment injunction against petitioners' dissipation of monetary assets was accordingly "of the same character" as the final order the court would enter if respondents prevailed on the merits. And although *De Beers* certainly also stands for the proposition that a district court may not properly grant a preliminary injunction restraining the transfer of property merely in order to secure against a remote and contingent risk of non-compliance with the court's future orders, that is merely a particular application of the general principles that an injunction must be appropriately tailored to achieve its results, and should not in any event issue unless the party seeking it can establish that in the absence of relief it is at genuine risk of suffering irreparable harm. See pp. 13-15, *supra*; *First Nat'l City Bank*, 379 U.S. at 398-399 (Harlan, J., dissenting) ("Clearly the Court's point [in *De Beers*] in emphasizing the scope of the order which could issue in the first instance was that the possibility of an ultimate levy was too remote in practical terms to justify freezing the property from the

outset of the litigation. Remoteness is the determinative point, whatever its cause.").[8]

A more pertinent precedent is *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282 (1940). The underlying suit in that case alleged that one defendant (Independence) had fraudulently sold securities to the plaintiffs; that Independence was "insolvent and threatened with many law suits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion"; and that the proceeds of the fraudulent sales had been transferred to another defendant (the Pennsylvania Co.), which held a portfolio of securities in trust and possessed some cash derived from its administration of the trust. *Id.* at 285-286. The plaintiffs sought a preliminary injunction "restraining Pennsylvania from transferring or disposing of any of the assets of the corporations or of the trust," and the district court granted such an injunction to the limited extent of some $38,000 in cash. *Ibid.*

This Court concluded that the Securities Act of 1933 established "a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him," and that the plaintiffs' complaint adequately "state[d] a cause for equitable relief." 311 U.S. at 288. The Court then held that

[8] This is the sense of the Court's observation (325 U.S. at 223) that it would be startling if the plaintiff in "any" legal action could obtain a prejudgment injunction, based solely on the remote but ever-present possibility that a judgment would go unsatisfied. Of course prejudgment injunctions should not be routine, any more than prejudgment attachments or sequestrations are in litigation among solvent parties. They will be permissible only where, as here, the moving party can make an adequate preliminary showing that, for example, the defendant is or is about to become insolvent, or is likely to conceal or dissipate the only assets available to satisfy a judgment.

the preliminary injunction "was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill," because in view of allegations "that Independence was insolvent and its assets in danger of dissipation or depletion[,] * * * the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate." *Id.* at 290. *Deckert* thus confirms that injunctive relief is available to secure the ability to recover money, at least through an action that is itself characterized as "equitable."[9]

Moreover, although petitioners characterize *Deckert* as involving "an equitable claim to a specific *res* or thing in the possession of the defendant" (Br. 11), it is not at all clear that that characterization is consistent with (let alone required by) this Court's analysis. That analysis emphasized that the plaintiffs' claims were against a vendor of securities (Independence); that they sought to "enforce" their right to restitution of consideration (from the vendor) "against a third party where the vendor is insolvent and the third party has assets in its possession belonging to the vendor"; and that the district judge had properly limited his injunction to prohibiting the transfer, not of some specifically identifiable "res" (such as shares of stock held for the benefit of the plaintiffs), but to a modest amount of miscellaneous cash held by the Pennsylvania Co. and more than sufficient to secure any judgment that might be rendered on the plaintiffs' claims against Independence. See 311 U.S. at 284, 286, 290. While *Deckert* does not decide this case, its essential circumstances are so similar to those at issue here that its holding lends considerable support to respondents' position.

Finally, in *United States* v. *First National City Bank*, 379 U.S. 378 (1965), this Court upheld a preliminary injunction

[9] See *Steelman* v. *All Continent Corp.*, 301 U.S. 278, 289 (1937); *Richmond* v. *Irons*, 121 U.S. 27, 44-45 (1887).

freezing assets to secure the payment of a likely future money judgment. The underlying case was an action to collect federal taxes from Omar, S.A., a Uruguayan corporation. *Id.* at 379-380. Alleging that Omar had been transferring its assets abroad, the government sought and obtained a preliminary injunction restraining various banks and brokers from transferring property belonging to Omar pending the outcome of the action. *Id.* at 380. In sustaining the injunction, this Court noted that the district court had specific statutory authority to issue any injunction "necessary or appropriate for the enforcement of the internal revenue laws." *Ibid.* (quoting 26 U.S.C. 7402(a)); see also *id.* at 383 ("our review of the injunction as an exercise of the equity power granted by 26 U.S.C. § 7402(a) must be in light of the public interest involved"). The Court then held that "[o]nce personal jurisdiction of a party is obtained, the District Court has authority to order [the party] to 'freeze' property under its control, whether the property be within or without the United States" (*id.* at 384), and that the preliminary injunction actually issued by the district court was "eminently appropriate to prevent further dissipation of assets." *Id.* at 385. Adverting to its own prior decisions, the Court distinguished *De Beers* on the ground that the case before it, "[u]nlike *De Beers*," involved "property which would be 'the subject of the provisions of any final decree in the cause,'" and relied on *Deckert* to support its concluding observation that the preliminary injunction was "'a reasonable measure to preserve the status quo' * * * pending service of process on Omar and an adjudication of the merits." *Id.* at 385 (quoting *De Beers*, 325 U.S. at 220, and *Deckert*, 311 U.S. at 290).

First National City Bank involved a specific statutory grant of injunctive authority and the paramount public interest in tax collection, elements that are not present in this case. Nonetheless, the Court's reasoning that it was proper

to use that injunctive authority to "freeze" property to secure the payment of a future money judgment, and that such an order was (as in *Deckert*) "a reasonable measure to preserve the status quo," sweeps more broadly, and again supports respondents' position in this case. Moreover, the Court's distinction of *De Beers* on the ground that it did not involve a potential monetary award is similarly applicable here. See also 379 U.S. at 397-399 (Harlan, J., dissenting) (arguing that the key factor in *De Beers* was "the remoteness of any levy by the Government against the property of the defendants," *id.* at 398).

Thus, contrary to petitioners' argument (Br. 14), this Court's cases do not suggest the result that they seek here; to the contrary, they support the position advanced by respondents. At a minimum, they are too equivocal in whatever support they furnish petitioners to justify relying on their authority to reach a result that, as we have seen, is not justified by logic or function in the context of modern unified practice before the federal courts.

C. The Availability Of Prejudgment Injunctive Relief In Actions Brought By Public Authorities Is Important To The Effective Enforcement Of Federal Law

For the reasons we have given, we believe that a district court may grant any plaintiff a pre-judgment injunction restraining the defendant's dissipation of its assets, on the basis of an appropriate showing that insolvency or other factors make such an order necessary in order to protect the enforceability of a final monetary judgment that the court is likely to render in the plaintiff's favor. Whatever the result, however, in a case like this one that involves only private parties, such injunctions are available in actions brought by the government to enforce federal law.

This Court has long recognized that when Congress has authorized a federal agency to bring an action to enjoin acts

made illegal by statute, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946).[10] Indeed, because "the public interest is involved in a proceeding of th[at] nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.*; see also *First Nat'l City Bank*, 379 U.S. at 383; *Virginian Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 552 (1937). Thus, for example, in injunctive actions brought by the Securities and Exchange Commission, courts have held that "any form of ancillary relief may be granted where necessary and proper to effectuate the purposes of the statutory scheme." *SEC* v. *Materia*, 745 F.2d 197, 200 (2d Cir. 1984) (disgorgement of illegal profits), cert. denied, 471 U.S. 1053 (1985).[11] Moreover, the government frequently brings suit to obtain restitution or disgorgement of amounts obtained by, for example, the filing of false claims, and often also seeks the imposition of monetary penalties prescribed by law. In all such actions, we submit, a district court may grant a pre-

[10] *Porter* arose under Section 205(a) of the Emergency Price Control Act of 1942, Ch. 26, 56 Stat. 33, which authorized the government to seek court orders enjoining actual or threatened violations of the Act. There are numerous similar provisions presently in force. See, *e.g.*, 15 U.S.C. 77t(a), 78u(d)(1), 80a-41(d), 80b-9(d) (securities laws); 7 U.S.C. 13a-1 (Commodity Exchange Act); 15 U.S.C. 53(b) (Federal Trade Commission Act); 15 U.S.C. 1714(a) (Interstate Land Sales Full Disclosure Act); see also *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d 711, 717-718 (5th Cir.) (listing statutes), cert. denied, 456 U.S. 973 (1982).

[11] See *SEC* v. *Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990) (asset freeze); *SEC* v. *American Bd. of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987) (appointment of receiver), cert. denied, 485 U.S. 938 (1988); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1339 (2d Cir.) (appointment of interim board of directors), cert. denied, 417 U.S. 932 (1974); *SEC* v. *Radio Hill Mines Co.*, 479 F.2d 4, 6 (2d Cir. 1973) (imposition of additional reporting requirements); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (appointment of trustee).

judgment order "freezing" assets of the defendant, if such an order is necessary to assure that sufficient assets will be available to satisfy a final monetary judgment.[12]

The specific statutory basis for, and the public interest necessarily involved in, most government actions distinguishes them from many private actions, including the underlying action in this case. Thus, for example, although a court that is asked to issue an injunction in a statutory enforcement action must "giv[e] necessary respect to the private interests involved" (*Porter*, 328 U.S. at 400), the courts have recognized that "the statutory imprimatur given [government] enforcement proceedings is sufficient to obviate the need for a finding of irreparable injury[,] at least where the statutory prerequisite * * * has been clearly demonstrated." *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975); see also *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *CFTC* v. *Muller*, 570 F.2d 1296, 1300 (5th Cir. 1978). Similarly, lower courts have properly held that in such actions a district court may enter a pre-judgment order restricting a defendant's control over its assets in order "to preserve the status quo so that an ultimate decision for the [government] could be effective." *Id.* at 1300 (citing *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1105-1106 (2d Cir. 1972)); see also *SEC* v. *Cherif*, 933 F.2d 403, 407 (7th Cir. 1991) (enjoining asset transfers "so as to preserve the possibility of recovering civil penalties or disgorgement of illegally obtained profits"), cert. denied, 502 U.S. 1071 (1992).[13] And the

[12] A number of federal statutes provide expressly for such orders. See, *e.g.*, 18 U.S.C. 1345(a)(2) (1994 & Supp. II 1996); 42 U.S.C. 1320a-7a(k), 1320a-8(h).

[13] See also, *e.g.*, *United States* v. *Taylor*, 139 F.3d 924, 926 (D.C. Cir. 1998) (noting freeze imposed on all personal and corporate assets); *SEC* v. *Interlink Data Network, Inc.*, 77 F.3d 1201, 1202 (9th Cir. 1996) (freezing assets); *FTC* v. *H.N. Singer, Inc.*, 668 F.2d 1107, 1111-1112 (9th Cir. 1982)

same analysis applies whether or not the assets involved are specifically traceable to alleged illegal activity. *Kemp* v. *Peterson*, 940 F.2d 110, 113-114 (4th Cir. 1991).[14]

The ability to obtain prejudgment orders preventing defendants from dissipating or secreting assets is important to the effective enforcement of federal law, whether in regulatory actions or in government litigation involving commercial misconduct or civil fraud. Unless a court can maintain the financial status quo before final judgment, the government's ability to pursue and collect monetary remedies will be seriously compromised. Whatever the outcome of this case with regard to the private parties involved, we respectfully request that the Court take account of the important public interest in the availability of prejudgment orders in government litigation.[15]

(freezing assets except for ordinary business and living expenses); *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d at 717-719 (freezing assets).

[14] It is sometimes possible to protect a potential disgorgement judgment by means of an order limited to transfers of specific assets, such as identifiable proceeds of illegal conduct. *SEC* v. *Cavanagh*, 155 F.3d 129, 131 (2d Cir. 1998) (freezing assets to the extent of proceeds of illegal conduct); *SEC* v. *Certain Unknown Purchasers of Common Stock*, 817 F.2d 1018, 1019 (2d Cir. 1987) (freezing insider trading profits), cert. denied, 484 U.S. 1060 (1988). In many cases, however, the specific proceeds of illegal activity have been dissipated or cannot be traced. Moreover, when the expected monetary award consists of civil penalties, rather than disgorgement, "tracing" is not relevant. Cf. *SEC* v. *Unifund SAL*, 910 F.2d at 1041 ("the order freezes funds in an amount sufficient to cover not just the profits that might have to be disgorged but the civil penalty, equal to three times the profits, that the Commission may recover").

[15] Petitioners' brief includes (at 20-30) an extensive argument based on the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). That argument was not advanced in the petition, and it is not apparent whether it is fairly included within the question presented. Compare Pet. i with Pet. Br. i (adding reference to diversity jurisdiction). In any event, because the United States may always invoke the jurisdiction of the federal courts (see 28 U.S.C. 1345) and suits brought by the federal government are almost invariably governed by federal law, we do not address the *Erie* argument.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A.; DESARROLLO DE INFRAESTRUCTURA, S.A. DE C.V.; OBRAS Y PROYECTOS, S.A. DE C.V.; DESARROLLO URBANO INTEGRAL, S.A. DE C.V. and DESARROLLO INDUSTRIAL LATINO AMERICANO, S.A. DE C.V.,

Petitioners,

vs.

ALLIANCE BOND FUND, INC.; ALLIANCE WORLD DOLLAR GOVERNMENT FUND II, INC.; ALLIANCE GLOBAL DOLLAR GOVERNMENT FUND, INC.; ELLIOT ASSOCIATES, L.P.; AVALON TOTAL RETURN FUND, L.P.; THE VARDE FUND, L.P.; THE VARDE FUND II-A, L.P.; THE VARDE FUND II-B, L.P.; THE VARDE FUND III-A, L.P.; THE VARDE FUND III-B, L.P. and THE VARDE FUND IV-A, L.P.;

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE THE DOMINICAN REPUBLIC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Should a United States district court be restrained by principles of comity from issuing a preliminary injunction freezing property of a foreign defendant outside the United States that is unrelated to the plaintiff's claim, when the basis of the injunction is the defendant's payment of *bona fide* claims of foreign creditors in accordance with the debtor-creditor laws of the defendant's foreign sovereign?

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BRIEF OF THE DOMINICAN REPUBLIC, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus, The Dominican Republic, a nation that has long enjoyed friendly relations with the United States, has a compelling interest in this case, because the decision under review is a serious intrusion by the United States courts into the sovereign rights of other nations, particularly their rights to enforce their own debtor-creditor regimes over property of their citizens within their territory.[1]

Like most nations, the Dominican Republic has enacted laws governing debtor-creditor relations, priorities among creditors, insolvency and bankruptcy. Like the United States Bankruptcy Code, these laws regulate the manner in which the limited assets of financially distressed debtors may be allocated among their creditors, either in consensual debt restructurings or formal insolvency proceedings. These rules contain elements of both party autonomy—generally, before the declaration of bankruptcy, a debtor under the law of the Dominican Republic is free to manage its assets and to pay any of its *bona fide* creditors to the exclusion of others—and legislatively prescribed priorities for such obligations as taxes owed to the state, Dominican Republic Civil Code Art. 2098, and wages owed to employees for the past and current year, Dominican Republic Civil Code Art. 2101. Other nations, of course, have similar rules.[2]

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1. The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. No party to this action or their counsel authored this brief, in part or in whole. No person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

2. *See* n. 7 *infra*.

The decision of the Second Circuit freezing property outside the United States of a non-United States debtor by means of a preliminary injunction at the behest of a group of United States creditors (to which the district court later added a mandatory injunction ordering the frozen property to be transferred to the same self-selected creditor group)[3] fails even to recognize the existence of the debtor-creditor regime of the nation where the debtor and its property are located, much less extend any comity to that nation's rules or the national interests and policies behind them. The Second Circuit's decision treats the power of federal courts sitting in diversity cases to issue extraterritorial injunctions over property of non-United States defendants outside the United States no differently than their power over property located within the United States. Its opinion contains no suggestion of concern for foreign nations, foreign creditors, foreign laws or international law. There is no indication that the Second Circuit considered the interests of the international community, or of the United States itself, in avoiding conflicts over encroachments on other nations' rights to regulate property in their own territories, despite this Court's many decisions requiring sensitivity and caution when United States courts exercise jurisdiction in ways that impinge on other sovereigns.

These concerns go to the heart of the way United States courts interact with foreign jurisdictions and foreign laws in the ever-increasing number of multi-national disputes that come before them. The Dominican Republic submits this brief to assist the Court in addressing them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has always been sensitive to the interests of foreign nations in its decisions regarding the jurisdiction and

3. Cert. Pet. App. 59a.

powers of the United States courts. In areas ranging from the deference due to acts of foreign governments within their own territories under the act of state doctrine, *see, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), to restricting the scope of personal jurisdiction to avoid unreasonable burdens on the international system, *see Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), to accommodating United States discovery rules to the evidence-gathering systems of foreign states, *see Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987), this Court has recognized that the interests of foreign nations must be carefully weighed in determining how far to extend the reach of United States jurisdiction, procedures and remedies in civil litigation.

Each of these areas involves, in whole or in part, an underlying concern for comity. While " '[c]omity' in the legal sense, is neither matter of absolute obligation, on the one hand, nor mere courtesy and good will, upon the other," *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), this Court has traditionally recognized that comity and the concerns underlying it must be taken into account when United States courts decide disputes that involve foreign nations, foreign persons or foreign property. In deference to these concerns, this Court has determined in a variety of contexts that, even where judicial power may exist in the abstract, its exercise should be limited in order to avoid affronts to other nations that also have an interest in a party to, or the subject matter of, a dispute with transnational connections.

The Second Circuit's decision fails to heed, or even consider, the Court's teachings in this area. Its decision holds that whenever a plaintiff in a United States court can show that a financially distressed foreign debtor is paying its domestic creditors, including government taxing authorities and wage

claims with priority under local law, a United States court may enjoin the foreign debtor from making these payments and freeze any or all of its foreign property to ensure satisfaction of the United States plaintiff's claims. Although the Second Circuit's decision is couched in terms of "irreparable injury" stemming from the "dissipation of assets," Cert. Pet. App. 16a-18a, its opinion makes clear that this "dissipation" was simply the payment by petitioners of the claims of one group of legitimate creditors—the Mexican government, terminated employees, trade creditors and Mexican banks and other financial institutions—rather than another group of creditors. The Second Circuit's remedy for this "preference," which was not shown to be illegal under either United States or Mexican law, was simply to turn it about and prefer the respondents over the Mexican creditors. The Court of Appeals thus sanctioned extraterritorial freezes of the foreign assets of foreign defendants in virtually all cases where a foreign debtor owes more money than it is able to pay.

The effects of this expansive assertion of the injunctive powers of United States courts, if upheld by this Court, cannot be minimized. The Second Circuit's approach allows any creditor who can obtain personal jurisdiction in the United States over a foreign debtor—whether under a debt instrument or otherwise—single-handedly to prevent that debtor from either voluntarily restructuring its indebtedness to its local creditors or acting consistently with the legal priorities and obligations imposed upon it by local law with respect to the repayment of its local debts. Its decision threatens to entangle United States courts in the reorganization of financially troubled foreign corporations even when, as in the instant case, they have no property in the United States and therefore cannot be the subject of either plenary or ancillary proceedings under the United States Bankruptcy Code.

Since the Mexican debt crisis of 1982, numerous countries throughout the world have been required to restructure both their public sector and private sector debt in order to deal with their own economic problems and the fluctuations of the global economy. Upholding the Second Circuit's decision would decisively alter the balance among the parties to such restructurings, by allowing any dissatisfied creditor not merely to obtain a judgment for money due to it, but for all intents and purposes to execute upon that judgment through the use of extraterritorial injunctions directed at the debtor's foreign assets, in derogation of the rights of creditors who do not have the benefit of a United States court order. Nor would the Second Circuit's decision be limited to private sector foreign debtors, for its reasoning could be employed against sovereign debtors as well, thereby undermining the protections afforded foreign states and their agencies and instrumentalities under the United States Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.* (1998).

The Court should not allow these results. Extraterritorial injunctions cannot be justified when their rationale and purpose is to prevent foreign debtors from paying legitimate obligations to foreign creditors. At a minimum, such injunctions, which clearly implicate the sovereign power of the nation where the property that is the subject of the order is located, should be limited to situations where the debtor is actually defrauding creditors or secreting its assets. United States courts should not reach into foreign jurisdictions to freeze assets merely so that creditors who sue in United States courts can get a better deal than foreign creditors.

ARGUMENT

THE EXERCISE OF JUDICIAL POWER BEYOND A COURT'S NATIONAL BOUNDARIES MUST BE CONSTRAINED BY PRINCIPLES OF COMITY.

A. Every Nation Enjoys The Right To Exercise Sovereign Power Within Its Territorial Boundaries

This Court has always approached extraterritorial extensions of the powers of the United States with caution. This caution is founded on both considerations of prudence and principles of sovereignty embedded in the law of nations, which has always been considered to be a part of the jurisprudence of the United States. *See The Paquete Habana*, 175 U.S. 677, 700 (1900). Under the classic view of sovereignty, each nation has the exclusive authority to exercise governmental power within its territorial borders:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within it own territories, must be traced up to the consent of the nation itself.

The Schooner Exch. v. McFaddon, 11 U.S. [7 Cranch] 116, 135 (1812) (Marshall, C.J.); *see also Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is

derived."). There can be no doubt here that the property over which the Second Circuit effectively exercised dominion, albeit in the procedural form of an injunction directed *in personam* at the property's foreign owner, was subject to the sovereign power of Mexico, not to the power of the United States.

B. Exercising Judicial Remedies Extraterritorially Implicates Principles Of Foreign Sovereignty And International Comity

The extraterritorial exercise of sovereign power—whether legislative or judicial—threatens to infringe on the sovereign power of another nation, thereby ultimately undermining the sovereignty of all states, including the extraterritorial actor. This Court has therefore moved with circumspection and care in dealing with situations in which the exercise of the power of the United States may result in such infringement. In construing the exercise of the legislative power embodied in Acts of Congress, the Court has held, for example, that legislation prescribing standards of conduct is always to be construed not to regulate beyond the territorial boundaries of the United States unless a contrary legislative intent appears. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 282, 285 (1952). This judicial presumption derives from this Court's desire to protect against "unintended clashes between [U.S.] laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)).

Likewise, the Court has consistently ruled that exercise of the judicial power of the United States should be informed by a respect for the laws and interests of other sovereigns. As the Court long ago recognized:

> The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, *or by judicial decree*, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."

Hilton, 159 U.S. at 163 (emphasis supplied). The principle of international comity refers to the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n. 27 (1987).

> Comity is not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.

Id. at 555 (Blackmun, J., dissenting).

The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959). This Court has admonished the lower federal courts to

> demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

Société Nationale, 482 U.S. at 546.

This sensitivity to the sovereign interests of other nations is reflected in a variety of constraints that this Court has recognized on the exercise of judicial power: the doctrines of sovereign immunity (originally recognized by the Court in *The Schooner Exchange* long before it was legislatively codified in the FSIA), act of state, choice-of-law rules, and comity all reflect the self-interest of the United States in respecting, at the overlap of territorial boundaries, the relevant interests of foreign nations. In light of these self-imposed constraints, the Court has developed an entire body of case law for the purpose of guiding the legitimate exercise of judicial power where the potential for conflict with another sovereign exists. *See, e.g., The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (deferring to competence of foreign court selected by parties to adjudicate claim); *Romero*, 358 U.S. 354 (declining to impose Jones Act liability on foreign ship where vessel merely passed through U.S. territorial waters); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (deferring to competence of arbitral tribunal); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (deferring to competence of foreign courts to resolve transnational claims).[4]

The Court of Appeals ignored this long tradition of caution when it upheld a wholesale extraterritorial freeze of a foreign defendant's property without any consideration for principles of comity or the interests of the foreign sovereign of the territory where the property was located. Although the Second Circuit made a brief reference to the principle that "injunctive relief seeking to prohibit conduct outside the district court's jurisdiction should be 'exercised with great reluctance,' " Cert. Pet. App. 7a-8a, the Court of Appeals in truth exhibited no reluctance at all to found a broad extraterritorial injunction

4. These constraints are, of course, in addition to those required by constitutional principles of federalism in the interaction of United States courts with the sovereignty of the states and state judiciaries.

solely on the existence of *in personam* jurisdiction over the defendant debtor and the broad powers that it found to be implicit in Rule 65 of the Federal Rules of Civil Procedure. It did not discuss, or apparently consider, the problems created by a court exercising its power within the territory of another sovereign nation identified long ago by the Second Circuit itself:

> We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country.

Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir. 1956). Instead, it permitted an injunction to freeze the foreign assets of a foreign corporation in the midst of restructuring its debt, without regard for the interests of the foreign defendant's sovereign or its local creditors, in a manner calculated to make such restructurings in other cases more difficult or impossible.

C. Exercising Judicial Control Over Extraterritorial Assets In The Context Of A Financially Troubled Foreign Company Threatens To Conflict With Local Authority And Reorganization Regimes

The effect of the district court's order was first to freeze—and later to order the transfer of—the petitioners' principal assets in Mexico, thereby making their property unavailable to pay claims of petitioners' other creditors, including tax claims by the Mexican government, severance claims of Mexican employees and claims of Mexican bank creditors, that in the

aggregate were considerably greater than the claim held by respondents. Cert. Pet. App. 4a. The record reflects that petitioners were in financial distress and were seeking to negotiate the restructuring of their debt to Mexican and foreign creditors alike. The record also reflects that petitioners' five largest creditors, the Mexican government, Mexican banks, Mexican financial institutions, trade creditors and terminated employees, held obligations with a value six times greater than those held by the group of United States creditors whose interests the district court's order was designed to protect. *Id.*

Many nations, including Mexico and a number of other countries in Latin America, do not have a statutory framework like Chapter 11 of the Bankruptcy Code for reorganizing financially troubled companies under judicial supervision rather than liquidating them.[5] Instead, companies in these countries that need to restructure their debts must typically conduct private negotiations with all interested parties to arrive at a consensual solution. Litigation remains a possibility in these countries for enforcing creditor rights, but the practical impediments to realizing on the debtor's limited assets in most cases channel creditor choice toward either negotiation with the debtor or forcing liquidation proceedings. Such negotiations are of course informed by the statutory priorities mandated by the debtor-creditor laws and insolvency laws of the debtor's sovereign, which would be applied if liquidation occurred.

These priorities, and more generally, the debtor-creditor regimes of which they are a part, reflect the policies of the

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5. *E.g.*, The Dominican Republic, Guatemala, Uruguay, and Chile. Mexico, for example, has a provision for suspension of payments (*suspension de pagos*) as part of its bankruptcy law, *see* Mexican Bankruptcy Law Arts. 408-411, but it is seldom used because a suspension request must be accompanied by a completed restructuring agreement and is otherwise subject to significant practical restrictions.

nation where the debtor and its property are located. With their preference for voluntary debt restructurings negotiated between a debtor and its creditors, whether domestic or foreign, they are entitled to the same respect, as regards property within that nation's territory, that the United States would expect United States bankruptcy policies and priorities to be accorded by foreign sovereigns with respect to property in this country.

The Second Circuit's extraterritorial freeze decision is the antithesis of this kind of respect for the operation of foreign legal regimes within the territories of foreign states. By preventing payment of foreign debts to foreign creditors out of the debtor's foreign property, it disregards the debt priority schemes of foreign law. More generally, it subverts the reorganization regimes of foreign countries with respect to assets within their jurisdiction. If a United States court can exercise the power to freeze all assets of a foreign company, based solely on its submission to personal jurisdiction with respect to a particular credit agreement, the court effectively freezes the restructuring process for all creditors, irrespective of their priority or status. The Court of Appeals' decision permits United States creditors to hold the reorganization process of a foreign company hostage, even when, as here, most of its creditors (and all of its priority creditors) are foreign and no resolution of its debts would be possible in any United States proceeding.[6]

6. Since, as in this case, litigation over loan agreements will typically not support federal question jurisdiction, the only creditors who could sue a private foreign debtor in federal court and obtain the kind of preliminary relief granted here are United States citizens, as the joinder of any alien creditors as plaintiffs would defeat diversity jurisdiction. 28 U.S.C. § 1332(a)(2). Inasmuch as foreign debtors are likely to have at least as many foreign creditors as United States creditors, no United States district court will have before it all the creditors necessary to effect a complete resolution of the debtor's obligations, even if it were otherwise appropriate for a district court to act in effect as an insolvency tribunal for a foreign debtor that could not be the subject of United States bankruptcy proceedings.

Nor can the Second Circuit's "irreparable injury" rationale for acting in a manner so destructive of respect for foreign nations' legal regimes and foreign debtors' debt restructuring efforts withstand analysis. The Second Circuit ruled that the petitioners' payment of other creditors was a "dissipation" of assets that caused irreparable injury to the respondents justifying the grant of preliminary injunctive relief. To reach this result, it distinguished its prior decision in *Chemical Bank v. Haseotes*, 13 F.3d 569, 572-73 (2d Cir. 1994) (per curiam), which held that an irreparable injury cannot be shown when the transferor legitimately sought to pay off creditors, rather than frustrate an eventual judgment. But here, according to the Second Circuit, the debtor "was improperly establishing a priority of creditors." This reasoning was gravely flawed.

In fact, the "less than benign" actions attributed to petitioners by the Court of Appeals—"establishing a priority of creditors" that did not give respondents first place, Cert. Pet. App. 18a—were perfectly legitimate. As a general principle of Mexican law, as is the case in many countries,[7] before a company is declared bankrupt by a judicial authority,[8] it is free to manage its assets and to pay any of its *bona fide* creditors to the exclusion of others. There is no suggestion in the record that any of petitioners' Mexican creditors were not *bona fide*, and the petitioners were therefore entirely within their rights in paying the legitimate claims of these creditors. Indeed, under New York law as well, which governed the notes held by respondents, it is completely permissible for a debtor, outside

7. *E.g.*, Argentina: Civil Code Arts. 31, 35, 52, 53, Bankruptcy Law Arts. 16, 107; Chile: Civil Code Art. 1446, Bankruptcy Law Arts. 64, 72; Mexico: Civil Code Art. 1798, Bankruptcy Law Arts. 83, 408-411; Peru Civil Code Arts. 3, 76; Legislative Decree 845, arts. 19, 118.

8. In the case of Mexico, a company's freedom to manage its assets will also be restricted once it has filed for suspension of payments.

of bankruptcy, to pay one *bona fide* creditor rather than another. *Ultramar Energy Ltd. v. Chase Manhattan Bank, N.A.*, 599 N.Y.S. 2d 816, 819, 191 A.D. 2d 86, 90-91 (1st Dep't 1993). The only body of law that would proscribe an insolvent debtor's paying one creditor in preference to another would be the United States Bankruptcy Code (and only to the extent of providing, in certain circumstances, for the debtor in possession or bankruptcy trustee to recover preferential payments for the benefit of all of its unsecured creditors, *see* 11 U.S.C. § 547), but petitioners neither were nor could have been the subject of any case or proceeding under the Bankruptcy Code.

Not only were any payments that may have preferred certain *bona fide* creditors over others permitted under the laws of Mexico and most other countries, including the United States, but the "priority of creditors" that the Court of Appeals decried was *required*, to a significant extent, by Mexican law. Section XXIII of Article 123 of the Mexican Constitution expressly creates a super-priority in favor or workers and employees for salaries due during the year preceding bankruptcy. In addition, the Mexican fiscal code establishes a priority in favor of tax liabilities. C.F.F. Art. 149.[9] These types of legislative priorities in allocating the limited assets of financially distressed debtors are fundamental aspects of Mexican debtor-creditor law, as they are under the legal systems of most nations.

9. In this respect, Mexico is no different from most other countries of Central and South America that have a priority structure established by law. *See, e.g.*, Dominican Republic: Civil Code Arts. 2092-2113, Code of Commerce Arts. 546-548; Guatemala: Code of Civil and Merchant Procedure Arts. 379-397, Code of Commerce Arts. 233, 682, 872; Peru: Civil Code Arts. 1118-1131, 1055-1090, Legislative Decree 845 of Sept. 21, 1996 Art. 24; Uruguay: Civil Code Arts. 2368-2371, Code of Commerce Arts. 1732-1760; Argentina: Civil Code Arts. 3875-3938, Bankruptcy Law Arts. 239-250; Chile: Civil Code Arts. 2465-2491. Nor is it unlike the priority system prescribed in the United States. *Cf.* United States Bankruptcy Code § 507.

The fact that the Court of Appeals viewed as an "improper[ ] . . . priority" a Mexican debtor's decision to follow Mexican law and pay Mexican taxes and Mexican employees ahead of United States lenders speaks volumes for its parochial vision and failure to extend comity to another nation's legal regime over property in the foreign state's territory. One can readily imagine how the United States would view a foreign court's decision that a United States national's payment of federal and state income taxes "improperly" created a "priority" at the expense of foreign creditors, so as to justify the foreign court in enjoining further use of the debtor's United States property for such "improper" purposes. Yet the Second Circuit gave no thought whatever, it seems, to the comity implications of its disdainful characterization of a Mexican debtor's compliance with its obligations to pay taxes to its own sovereign in Mexico, pay wages and severance to its employees and pay the other legitimate claims of its local creditors out of its local property.

Finally, and perversely, the lower court's injunctive "remedy" sequestering the debtor's foreign property simply reversed the "preference" posited by the Court of Appeals, by preferring United States creditors over non-United States creditors with respect to property located outside the United States and otherwise available to satisfy foreign creditors' claims. The freeze of petitioners' assets effectively prevented satisfaction of the claims of Mexican creditors until the claims of the United States creditors were decided. When the district court then took the next step and ordered the assets to be transferred to the United States creditors, it effectively converted the unsecured United States creditors[10] into fully

10. There is no dispute that respondents are unsecured creditors: "Both the Notes and the Guarantees are unsecured obligations that rank *pari passu* with all other present or future unsecured and unsubordinated indebtedness of GMD." Cert. Pet. App. 3a.

secured creditors. That the lower court failed even to address the impact of this exercise of power over foreign property on the interests of either Mexico or Mexican creditors is symptomatic of its disregard for the "spirit of cooperation" required when a court "approaches the resolution of cases touching on the laws and interests of other sovereign states." *See Société National*, 482 U.S. at 544 n. 27.

In the last analysis, comity requires self-restraint. In a world of independent sovereigns, each with its own laws over persons and property within its territory, self-restraint is essential to preventing collisions between nations and allowing the international legal system to function in a way that accommodates the interests of all of its legitimate actors. Here, the Second Circuit failed to exercise such restraint. Considerations of international comity make it inappropriate for United States courts to issue orders that, in effect if not in name, exercise jurisdiction over property outside the United States belonging to non-United States defendants when the defendants have done no more than pay their *bona fide* debts to their local governmental and private sector creditors in accordance with local law.

D. Extraterritorial Application Of Such Injunctions With Respect To Foreign Sovereign Assets Would Undermine The FSIA

Permitting extraterritorial injunctions under these circumstances could have particularly dramatic implications for actions brought in the United States against foreign *sovereign* debtors. Since the Mexican debt crisis of 1982, foreign sovereign debtors that have restructured their external indebtedness have been sued in the United States federal courts by dissatisfied creditors seeking to strengthen their hands in

the restructuring process.[11] The standard employed by the Second Circuit to freeze assets outside the United States under Rule 65 could easily be used to undermine the protections afforded foreign states under the FSIA.

Under the FSIA, the power of United States courts to attach property of foreign states and public sector corporations prior to the entry of judgment is narrowly limited to circumstances in which the foreign state or state corporation has explicitly waived its immunity from pre-judgment attachment and, if there has been such a waiver, only to property used for commercial activity in the United States. 28 U.S.C. § 1610(d). A pre-judgment freeze of the foreign state's property in its own country would completely circumvent the limitations on attaching or otherwise interfering with the foreign state's assets located in the United States. Similarly, allowing post-judgment mandatory injunctions requiring a foreign state to transfer to the United States its property located abroad would also subvert the requirement in the FSIA that the only property subject to execution in this country is property already located here and used for a commercial activity in this country. *Id.* at § 1610(a), (b).

The Court of Appeals decision could be used by aggressive creditors to undermine and circumvent these Congressional restrictions on attachment of foreign states' property, because it is explicitly couched in terms of injunctive power under Rule 65 rather than attachment under Rule 64, and holds that even when no basis for attachment exists under Rule 64, injunctive relief under Rule 65 may be granted under that court's expansive irreparable injury rationale. While we believe that existing

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11. Cases currently pending or just recently concluded involving creditor claims against foreign sovereign debtors in the United States District Court for the Southern District of New York alone include suits against Ecuador, Peru, Panama, and The Philippines.

construction of the FSIA should preclude these efforts, the Court of Appeals decision creates uncertainty of a kind calculated to produce grave friction with foreign states unless this Court provides clear guidance to the contrary. The Court should therefore make it clear that the Court of Appeals decision, even if it should otherwise be affirmed, does not license extraterritorial injunctions directed to property of foreign states located outside the territory of the United States.

E. The Existence Of *In Personam* Jurisdiction Does Not Alleviate The Need To Consider Principles Of Comity

The Second Circuit satisfied itself that the district court had authority to order an extraterritorial injunction solely on the basis of *in personam* jurisdiction over petitioners. However, the ability to exert sovereign power over a litigant and its assets, wherever located, is not, and never has been, sufficient to warrant the exercise of such powers to the exclusion of principles of comity.

Whether a court may assert *in personam* jurisdiction over a foreign litigant, in the first instance, and, having done so, whether the full panoply of judicial power should be exercised with respect to that foreign litigant are questions that must be answered in a fashion consistent with principles of comity. Thus, *Asahi* teaches that in determining whether a court may exercise *in personam* jurisdiction over a foreign defendant, " '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' " *Asahi*, 480 U.S. at 115 (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)). Such care and reserve requires:

> careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and

> an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

Id.

Moreover, even after *in personam* jurisdiction has been established, a court must nevertheless consider principles of comity: this Court has required courts to undertake a particularized analysis of the respective interests of the foreign nation before imposing the discovery regimen of the United States Rules of Civil Procedure where such a regimen would infringe on the sovereignty of that foreign nation. *Société Nationale*, 482 U.S. at 544.

Similarly, this Court has on occasion considered whether the exercise of certain judicial remedies merely because of the existence of personal jurisdiction might be inappropriate in certain circumstances:

> The word, "jurisdiction," is in this connection somewhat equivocal; in one sense the judge had it; the bank had personally appeared and was subject to his orders, as far as any corporation can be; [the judge] might sequester its property in Vermont, if he could find any, or he might proceed against its officers as for a contempt. But although [the judge] thus had the power to prevent the defendant from asserting its rights in Maine, it might still be improper for him to do so. Courts do not always exert themselves to the full, or direct parties to do all that they can effectively compel, and such forbearance is sometimes called lack of "jurisdiction."

United States v. First Nat'l City Bank, 379 U.S. 378, 388 (1965) (dissent quoting Judge Learned Hand in *Amey v. Colebrook Guaranty Sav. Bank*, 92 F.2d 62, 63 (2d Cir. 1937)).

The exercise of sovereign power with respect to assets located within the territory of another sovereign nation presents unique problems. It is qualitatively different from the regulation of a narrow range[12] of extraterritorial *conduct* when the impact of such conduct falls within the United States. Whereas regulating the conduct of a party, vis-à-vis its relationship with the United States, will often have a minimal impact on the foreign country in which the party is located and the citizens of that nation, affecting the status of property within another nation has serious implications for that nation and third parties. To prohibit a person's ability to take actions with respect to property is to define that person's interest in that property. To affect property, and title thereto, necessarily conflicts with local authority because it constricts and changes the rights appertaining to the property that had been recognized by the local authority. Even in the context of extraterritorial regulation of conduct, sovereign power is limited to the extent that it conflicts with the local authority. *Murray v. Schooner Charming Betsy*, 6 U.S. [2 Cranch] 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.").

Although *United States v. First National City Bank*, 379 U.S. 378 (1965), has been cited for the proposition that a court with '*personam*' jurisdiction over a party has the authority to freeze property under its control, whether the property be located within or without the tribunal's territorial jurisdiction, that case is distinguishable. In *First National*, the party enjoined was a United States citizen—a banking corporation chartered

12. Restatement (Second) of Foreign Relations Law of the United States § 402.

by the federal government. By contrast, petitioners here are foreign citizens. *First National* also involved a defendant that was removing its property from the United States to defeat a tax lien by the Government on that very property, while here there is no evidence that petitioners ever had property in the United States. Moreover, the majority in *First National* considered whether the district court's order would violate local law. *First Nat'l*, 379 U.S. at 384. Although petitioners consented to personal jurisdiction of the United States court, they did so for the sole purpose of adjudicating claims arising out of certain financial instruments. Adjudication of those claims is separate and distinct from the exercise of judicial control over the rights and interests of the foreign party in assets located outside the court's jurisdiction and wholly unrelated to the claims to which petitioners submitted themselves to the authority of the court to resolve.

Nor is the exercise of such a power necessary. Indeed, its exercise is unusual[13] and reflects an erosion of the traditional method of enforcing a judgment on property located outside the jurisdiction of the court: taking the judgment to the jurisdiction in which the property in question is located. If Rule 65 were to provide United States courts with the ability to freeze assets outside the jurisdiction of the court, pending the outcome of the action for purposes of insuring satisfaction of a potential judgment, there would be no logical barrier to then simply ordering a defendant to transfer the same assets into the jurisdiction to satisfy a final

13. Although the Second Circuit points to English Mareva injunctions as an example of similar equitable relief, Cert. Pet. App. 15A, unlike the case before the Court, the exercise of English judicial power over assets outside the jurisdiction, in recognition of the *in rem* affects of such orders on third parties, has been limited to a few extraordinary cases, typically involving fraud. *See, e.g., Babanaft Int'l Co. S.A. v. Bassatne* [1990] Ch 13 (Eng. C.A.); *Republic of Haiti v. Duvalier* [1990] QB 202 (Eng. C.A.); *Derby & Co. v. Weldon* [1990] Ch 48 (Eng. C.A.); *Derby & Co. v. Weldon* (nos. 3 and 4) [1990] Ch 65 (Eng. C.A.)

judgment.[14] That is indeed what occurred in the present case, where after finding petitioners liable to the plaintiffs and entering judgment in their favor, the district court issued a further mandatory injunction ordering petitioners to assign their rights in one of their principal assets, government notes issued to petitioners by the United Mexican States, to their United States creditors. Cert. Pet. App. 58a-59a.

Principles of comity and sovereignty demand that assertions of United States judicial power over property outside the United States must be limited. If this Court is prepared to recognize such an extraterritorial power in special circumstances, the exercise of this power should be narrowly limited to circumstances where a party is defrauding creditors or secreting assets. Extraterritorial injunctions should not be permitted because a foreign debtor is paying legitimate debts to *bona fide* foreign creditors in accordance with the law of its own nation.

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14. With respect to the FSIA, under the Second Circuit's test, which would require nothing more than the waiver of sovereign immunity and consent to jurisdiction routinely included in sovereign lending agreements, creditors of foreign states could fundamentally alter the debtor-creditor and inter-creditor relationship by bypassing the very protections Congress conferred on foreign sovereigns with respect to prejudgment attachments of their assets.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

GRUPO MEXICANO DE DESARROLLO, S.A., ET. AL.,
PETITIONERS

v.

ALLIANCE BOND FUND, INC., ET. AL.
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE THE SECURITIES INDUSTRY ASSOCIATION AND THE EMERGING MARKETS TRADERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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24pp

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QUESTION PRESENTED

Whether, in an action for money damages, principles of international comity deprive a federal court of the power, under any and all circumstances, to enjoin a foreign company that has sold securities in the United States from dissipating its assets in order to frustrate the enforceability of a judgment.

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75 L. Ed. 2d 675 (1983) 14

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14 F.3d 1507 (11th Cir.1994) 12

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INTERESTS OF THE *AMICI CURIAE*[1/]

The Securities Industry Association ("SIA") brings together the shared interests of more than 750 securities firms throughout North America. SIA members — including investment banks, broker-dealers, specialists, and mutual fund companies — are active in all markets and in all phases of corporate and public finance. In the United States, SIA members employ approximately 400,000 individuals. SIA member firms manage the accounts of more than 50 million investors directly, and tens of millions of investors indirectly, through corporate, thrift, and pension plans. The U.S. securities industry accounts for $270 billion of revenues in the U.S. economy.

The Emerging Markets Traders Association ("EMTA") is a New York based not-for-profit organization that promotes greater efficiency, professionalism and transparency in the trading of emerging markets debt instruments. EMTA was formed in 1990 by a group of global financial institutions in response to the new trading opportunities presented by the Brady Plan, a United States policy relating to debt obligations owed by foreign sovereigns. EMTA now has approximately 140 member institutions worldwide, including substantially all of the major commercial and investment banks that actively trade emerging markets debt instruments in the secondary markets.

[1/] The parties have consented to the filing of this *amicus curiae* brief and letters indicating their consent have been filed with the Clerk of the Court. No party, nor any party's counsel, authored any part of this brief nor has any person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief. Several respondents or their affiliates or officers are members of the Securities Industry Association and/or the Emerging Markets Traders Association.

SIA and EMTA submit this *amicus curiae* brief to assist the Court in determining whether Federal Rule of Civil Procedure 65 permits a district court in an action for money damages to enjoin a party from disposing of assets so as to frustrate an eventual judgment. This *amicus* brief will focus on this question in the specific context of international capital markets transactions like the one involved in the present case. The wealth of experience SIA has acquired in the securities field, and in international securities transactions in particular, and EMTA's extensive knowledge and interest in foreign debt transactions render the associations uniquely qualified to provide the Court with information and comment relevant to this topic.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of this *amicus* brief is to demonstrate the following two points:

1. The rule proposed by petitioners, that a federal court in an action at law for money damages lacks power to enjoin a defendant's dissipation of assets, would, if adopted, do serious harm to global capital markets and to United States investors in those markets. Investments by United States citizens in equity and debt offerings by foreign issuers are of growing importance to this country and to the world. To deprive United States investors of the kind of remedy granted here would increase the risk and cost associated with such transactions and would create a serious disincentive to investments in entities whose assets are overseas. Indeed, reversal of the decision below would often leave some creditors with no effective remedy and would render nugatory the contractual protections for which United States investors normally bargain. The need for injunctive relief to prevent the dissipation of assets in a proper case has been recognized by English and other courts for sound reasons that justify taking a similar approach in this country.

2. The considerations of international comity discussed in the *amicus curiae* brief of the Dominican Republic furnish no reason for adopting the law-equity distinction that petitioners advocate. The issue here is the *power* to issue an injunction; considerations of comity bear only on whether such an injunction should be issued in a particular case. Comity can and should be taken into account, together with all other equitable considerations, when an injunction against the dissipation of assets is sought. Here, the district judge properly weighed comity as well as other factors, and reached a correct result.

ARGUMENT

I. THE RULE PETITIONERS PROPOSE WOULD DO SERIOUS HARM TO THE GLOBAL MARKETPLACE AND TO UNITED STATES INVESTORS.

Petitioners' argument is, in essence, that Rules 64 and 65 of the Federal Rules of Civil Procedure codify the ancient distinction between law and equity, and thus prohibit the use of an injunctive remedy to prevent dissipation of the defendant's assets in an action at law. Such an injunction, petitioners contend, may be issued only "when a plaintiff, in an action for equitable relief, seeks an injunction with respect to the same *res* or thing that is the subject of its underlying claim." Brief for Petitioners at 10. Petitioners say that because this action, which seeks damages for breach of contract, would historically have been classified as legal rather than equitable, only attachment and other traditional common-law means of securing satisfaction of a judgment can be employed. The Second Circuit's opinion contains a well-considered analysis of the text and history of Rules 64 and 65, as well as of the decisions of this Court and lower-court precedents that refute petitioners' theory of an impenetrable barrier between law and equity.

Because these issues will doubtless be discussed in detail in respondents' brief, this *amicus* brief will focus on the policy considerations that also support respondents' position in this case. If this Court should decide, as petitioners ask, that the equitable powers of a federal district judge do not, in the relevant respect, exceed the powers of a medieval Chancellor, the consequences would be most unfortunate for today's global marketplace and United States participants in it.

The importance of international capital transactions in which foreign entities raise capital in the United States securities markets is enormous. In 1997, non-United States issuers registered over $100 billion in securities for public offering in the United States. More than 1,000 companies from 55 countries had SEC reporting obligations in the United States by the end of 1997, the last year for which statistics are available. Mark S. Bergman, *1999 Capital Markets Yearbook,* 24 *(published by the International Financial Law Review).*

But foreign registrants represent only a small portion of foreign equity trading. In 1997, the value of global equity trading hit $19.5 trillion, a 43% increase over the record $13.6 trillion traded in 1996; markets in the United States accounted for 52.4% of that trading. *See* 1998 Securities Industry Association Fact Book, 75 (1998). Moreover, gross sales of foreign bonds by foreigners to U.S. residents exceeded $1.999 trillion and gross sales of foreign stocks and bonds together exceeded $2.295 trillion. *See* Department of the Treasury, Financial Management Service, Treasury Bulletin, 94-95, Table CM-V-5 (December 1998). Over $15.6 billion in Mexican bonds alone were sold to residents of the United States in 1997. *See id.* Between 1994 and 1997, United States residents increased their net purchases (purchases minus sales) of foreign bonds by 422%. *See id.* at 96, Chart CM-D.

The growth in international capital transactions has brought and continues to bring enormous benefits to United States investors and to people all over the world. For investors in this country, of course, this trend has given rise to greater opportunities for diversification and higher yields than are available through instruments sold exclusively by United States issuers. From the foreign issuers' perspective, in many countries, including those lately emerged or still emerging from conditions of dire poverty, capital for development is now

available on an unprecedented scale. The home countries of issuers that are now benefiting from access to the United States' capital markets include Colombia, Malaysia, Lebanon, Liberia, Zaire and Syria. *See* Department of the Treasury, Financial Management Service, Treasury Bulletin, 92-93, Table CM-V-4 (December 1998)[2/] It is surely in the interests of both the United States and the developing world to foster the growth of these markets by assuring that participants in them have the benefit of modern and effective legal remedies.

Today's international capital markets are extraordinarily "efficient" in two senses of the term. First, they are efficient in the speed at which transactions can be accomplished. Literally billions of dollars can be moved from one country to another almost instantaneously, by computer transmission. The markets are also "efficient" in their assessment of information relevant to risk. *Cf. Basic Incorporated v. Levinson*, 485 U.S. 224, 246-47 & n.24 (1988) (recognizing that "[r]ecent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well developed markets reflects all publicly available information"). Investors calculate their risks with great precision, and insist on a return on investment that compensates them for that risk. This means that anything that needlessly

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[2/] The list of emerging market countries whose nationals have sold securities in the United States in 1997 alone includes: Argentina, Bahamas, Bermuda, Bosnia, Brazil, British West Indies, Bulgaria, Chile, Columbia, Croatia, Czech Republic, Ecuador, Egypt, Ghana, Guatemala, Herzegovina, Hungary, Indonesia, Israel, Jamaica, Lebanon, Liberia, Malaysia, Mexico, Montenegro, Morocco, Netherlands Antilles, Palestine, Panama, People's Republic of China, Peru, Philippines, Poland, Romania, Russia, Serbia, Singapore, Slovenia, Syria, Thailand, Trinidad and Tobago, Turkey, Uruguay, Venezuela, and Zaire. *See* Department of the Treasury, Office of Financial Management, Treasury Bulletin, 92-93, Table CM-V-4 (December 1998).

increases investors' risks increases the cost of raising money in the United States capital markets and makes it that much more difficult for those markets to perform their function.

The power of courts in the United States to grant injunctive relief against the dissipation of any assets, wherever located, is an important underpinning of the legal regime in which international capital markets operate. The situation that the District Judge in this case sought to remedy — the choice by an insolvent Mexican entity to pay its Mexican creditors while leaving its obligations to United States citizens unpaid — is certainly not an every-day occurrence. But the *risk* of such conduct for potential investors in the equity or debt securities of a foreign issuer is palpable and must be factored into every transaction.

When a foreign issuer does default and then dissipates its assets, petitioners concede that attachment and similar remedies will generally be useless, since the debtor's assets will be located in foreign countries, or can be moved to foreign countries in a matter of seconds. And when the debtor and its assets are outside the country, the United States bankruptcy laws are not effective to prevent discrimination among creditors, as they are in disputes with United States parties on both sides.

Even sophisticated investors cannot adequately protect themselves through contract. After all, here respondents were induced to invest through promises by the issuer to submit to the personal jurisdiction of the United States courts and to treat the United States investors on a *pari passu* basis with its unsecured home country creditors. *See Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 691 (2d Cir. 1998); *see also* Joint Appendix ("J.A.") 12, 90. Yet such contractual provisions would prove completely unavailing against any financially beleaguered foreign issuer which, out of

dishonesty or by virtue of local political and economic pressures, decides systematically to favor local creditors. When the problem of discrimination in favor of the debtor's home-country creditors arises, it can be dealt with effectively only by the sort of injunctive relief that the District Court granted.

If this Court were to conclude that the narrowly-tailored remedy fashioned by the District Court here is never available, on any set of facts, to United States investors, some investors will conclude that overseas investment is imprudent, and many will demand a higher rate of return to compensate for the increased risk of uncollectibility. This will foreseeably curtail—and in some cases altogether deny—access to the United States capital markets by foreign issuers on reasonable economic terms.

The practical importance of this kind of injunctive relief is reflected in the development over the last twenty years of the so-called *Mareva* injunction in England and other countries of the British Commonwealth. In *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.), the Court of Appeals of England held:

> If it appears that the debt is due and owing -- and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment -- the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

Mareva, 2 Lloyd's Rep. at 510.

Although initially *Mareva* injunctions were available only for assets located within the court's jurisdiction, the English courts later recognized that, since an injunction is premised on

in personam and not *in rem* jurisdiction, the *Mareva* holding is equally applicable to prevent dissipation of assets located outside the country. *See, e.g., Derby & Co. v. Weldon*, [1989] 1 All Eng. Rep. 1002, 1011 (C.A.); *Orwell Steel (Erection and Fabrication) Ltd v. Asphalt and Tarmac (U.K.) Ltd*, [1984] 1 W.L.R. 1097, 1100 (Q.B.D.); *The Tuyuti*, [1984] 2 Lloyd's L.R. 51, 56 (C.A.).

Courts in Commonwealth countries other than England have followed England's lead in adopting the *Mareva*-type injunction. *See, e.g., Natural Gas Corp. Holdings Ltd v. Grant*, [1994] 2 N.Z.L.R. 252 (H.C. Auckland) (New Zealand court noting in dicta that *Mareva* injunction having "world-wide" effect was properly issued); *Mooney v. Orr*, [1994] 1994 ACWSJ LEXIS 10688, *3 (B.C. Sup. Ct.) (Canadian court noting that "defendants obtained a world-wide *Mareva* injunction . . ." in deciding issue relating to whether the court had power to order certain disclosures); *Nat'l Australia Bank Ltd v. Bond Brewing Holdings Ltd*, [1991] 1 V.R. 386 (Victoria App. Div.) (Australian court issuing a *Mareva* injunction and appointing a receiver over foreign assets); *James v. Merrill Lynch Internat'l Bank Ltd*, [1998] 1 S.L.R. 785 (C.A.) (Singapore court noting that a "world-wide" *Mareva* injunction had been obtained in both Singapore and Hong Kong and appointing receiver over foreign assets); *see also* Mealey's International Arb. Report, Vol. 9, No. 9 (Sept. 1992) (reporting issuance of *Mareva* injunction in Hong Kong arbitration).

Thus, the courts of the country in which the distinction between law and equity originated have taken the lead in recognizing that the general principles of equity jurisdiction, not the ancient boundary between legal and equitable cases, should govern the issuance of an injunction. The standard for issuing *Mareva* injunctions in England is not a technical one, but incorporates the same equitable principles familiar to United

States judges in dealing with applications for injunctive relief. The *Mareva* standard is summarized in a leading treatise as follows:

> (1) whether the plaintiff has a good arguable case;
>
> (2) whether the plaintiff can adduce sufficient evidence as to the existence and location of assets which the injunction, if made, would affect; and
>
> (3) whether there is a real risk that the defendant may deal with those assets so as to render nugatory any judgment which the plaintiff may obtain.

J. O'Hare and R. Hill, *Civil Litigation*, 296 (8th ed. 1997).

The development of the *Mareva* injunction was founded in part on a recognition that it is suited to the needs of participants in modern business transactions. As the English Court of Appeals stated:

> We live in a time of rapidly growing commercial and financial sophistication and it behooves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts orders as to resisting the making of such orders on the merits of their case.

Derby, 1 All Eng. Rep. at 1007.

The position of the petitioners in this case is that the Federal Rules of Civil Procedure deprive United States District Courts of the flexibility to "adapt their practices" to this era of "rapidly growing commercial and financial sophistication." But

the rules can not fairly be read to impose any such strait jacket on United States District Courts. If the rules were so read, the result would be a significant adverse impact on international global markets and on the participation of United States investors in those markets.

II. THE COMITY CONSIDERATIONS STRESSED BY THE DOMINICAN REPUBLIC FURNISH NO REASON FOR ADOPTING THE RULE PETITIONERS SEEK

A. The Issue in this Case is the Existence of Power, not its Exercise.

The *amicus* brief of the Dominican Republic argues that a result in favor of respondents here would violate principles of international comity — a contention not raised by petitioners either in the District Court or in the Court of Appeals. This argument is based on a misunderstanding of the issue before this Court, which is simply whether the Federal Rules of Civil Procedure authorize a District Judge to issue an injunction like the one entered in this case. If a District Judge has power to issue such an injunction, principles of international comity may, in some cases, cause him or her to refrain from *exercising* that power. But principles of international comity cannot rationally support a holding that the power does not exist.

The legal issue of a District Court's *power* to issue an injunction against the dissipation of assets in an action for money damages is the same whether the dispute is international or not. To be sure, such injunctions are especially important to the predictability and efficiency of international business transactions. But if petitioners' theory is upheld, a District Judge sitting in New York could not issue such an injunction even where the defendant is a United States citizen and the asset in question is a bank account in Delaware. Indeed, most of the prior Court of

Appeals cases considering this question involved transactions and assets within the United States.[y] It would be strange indeed if considerations of international comity disabled a District Court from issuing this kind of injunction in such purely domestic disputes.

The Dominican Republic appears to suggest that the issue of a District Court's power to enter an injunction may turn on whether the dispute is a domestic or international one — *i.e.*, that Rules 64 and 65 of the Federal Rules of Civil Procedure should be read to prohibit injunctions against dissipation of assets in international cases, whether or not they are so read in a domestic context. Such a distinction is without any support in the language of the rules themselves, their legislative history or any decision interpreting them. But beyond that, such a distinction would be both unwise and unnecessary. It would be unwise for the reasons stated in Point I above: It is important to the international capital markets, and to United States participants in those markets, that such a remedy be available where needed. And it is unnecessary because principles of international comity can and will be taken into account by District Courts in deciding

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[y] *See Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 52-53 (1st Cir. 1986); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir.1984); *Foltz v. U.S. News & World Report*, 760 F.2d 1300, 1309 (D.C.Cir.1985); *Green v. Drexler* (In re: Feit & Drexler, Inc.), 760 F.2d 406, 416 (2d Cir.1985); *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir.1989); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1227 (8th Cir.1987); *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir.1986); *Dixie Carriers, Inc. v. Channel Fueling Service, Inc.* (In re: Fredeman Litigation), 843 F.2d 821, 824 (5th Cir.1988); *Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507 (11th Cir.1994).

whether to issue injunctions in specific cases, and by Courts of Appeals in reviewing those decisions.

The mere existence of power does not mean that it must be exercised in every case. No one disputes the basic principle, stated in the Dominican Republic's brief, that "the *exercise* of judicial power beyond a court's national boundaries must be constrained by principles of comity." Brief of Amicus Curiae the Dominican Republic in Support of Petitioners ("Dom. Rep. Br.") at 6 (emphasis added). In deciding whether to grant an injunction a court of equity is always constrained by, among other things, the impact that an injunction would have upon the public interest. *See, e.g., University of Texas v. Camenisch*, 451 U.S. 390, 392, 101 S.Ct. 1830, 1832, 68 L.Ed.2d 175 (1981). Among the public interests to be weighed, the principle of comity may be an important one. *Cf. Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995) (holding in context of federal/state concerns that "[e]quitable remedies are powerful, and with power comes responsibility for its careful exercise. These remedies can affect nonparties to the litigation in which they are sought; and when, as in this case, they are sought to be applied to officials of one sovereign by the courts of another, they can impair comity, the mutual respect of sovereigns . . ."); *see also Los Angeles v. Lyons*, 461 U.S. 95, 112, 103 S. Ct. 1660, 1670- 71, 75 L.Ed.2d 675 (1983).

Where comity counsels against such an injunction, it should not be issued. As an English court stated in discussing whether to issue a *Mareva* injunction, the essential issue is:

> whether in particular circumstances the grant [of a preliminary injunction] is right or just. What changes is not the power or the principles but the circumstances, both special and general, in which courts are asked to exercise this jurisdiction. This

> can and does call for changes in the practice of the courts.

Derby, 1 All Eng. Rep. at 1007.

Indeed, the very existence of the *Mareva* injunction in England and other countries undermines the Dominican Republic's argument that injunctions against the dissipation of assets in foreign countries are intrinsically an infringement of principles of comity. English and other courts have granted such injunctions in proper cases without noticeable damage to the fabric of international relations. The Court of Appeals in this case noted that it was "impressed" by the English experience of the past twenty years, as supporting the Court of Appeals' conclusion that the "parade of horribles" foretold by petitioners below was unlikely to occur. *Alliance Bond Fund*, 143 F.3d at 696.

The Dominican Republic seeks to brush off the *Mareva* injunction practice in a footnote, stating that the issuance of such injunctions "has been limited to a few extraordinary cases, typically involving fraud." (Dom. Rep. Br. at 21 n.13). This is not an accurate summary of the English practice. As noted above, the English courts base *Mareva* injunctions on traditional equitable principles, and fraud is not an essential element of the required showing, although "a real risk that the defendant may deal with . . . assets so as to render nugatory any judgment" is required. O'Hare and Hill, *Civil Litigation* at 296.

It is quite true, however, that the English courts do not issue *Mareva* injunctions lightly. Indeed, one such Court noted in the course of weighing a *Mareva* injunction:

> Considerations of comity require the courts of this country to refrain from making orders which infringe

the exclusive jurisdiction of the courts of other countries.

Derby, 1 All Eng. Rep. at 1011. Nor do respondents or the *amici* supporting them suggest that District Courts should lightly issue the kind of injunction at issue in this case. We do contend that the District Courts have *power* to issue such injunctions — a contention that the Dominican Republic brief does nothing to refute.

B. *The Injunction Issued in this Case Did Not Violate Principles of Comity.*

As we understand it, the question of whether the particular injunction issued by the District Court here was in violation of principles of comity is not before this Court. This fact-specific issue was not raised below, was not presented by the petition for certiorari, is not the subject of any conflict among the Circuit Courts of Appeal, and would not be an appropriate subject for this Court's discretionary exercise of its powers of review. If the Court should find it appropriate to reach that question, however, it should conclude that the decision of the District Court, affirmed by the Court of Appeals, was well within the District Court's discretion, and that no principle of comity was violated.

Contrary to the picture painted by the Dominican Republic's brief, the District Judge in this case was careful to respect Mexican sovereignty. Indeed, he rejected a suggestion by respondents that a trust be imposed on property located in Mexico, stating that the Court was not prepared "to start running things in Mexico." Petitioners' Appendix 30a, 37-39a. The District Judge required only that the defendants refrain from dealing with their assets in Mexico in such a way as to nullify the effect of a United States judgment. Powerful equitable

considerations supported his decision to grant such relief on the facts of this case:

(1) The defendants, while they are Mexican citizens, chose to raise $250 million through an offering of 8¼% Guaranteed Notes in the United States pursuant to Rule 144A under the Securities Act of 1933. It is well established that a foreign citizen who takes advantage of United States markets must conform its conduct to the dictates of United States law. *See, e.g., Securities and Exchange Commission v. Banca Della Svizzera Italiana*, 92 F.R.D. 111, 117 (S.D.N.Y. 1981) (holding that Swiss corporation could be compelled to comply with discovery even though disclosure violated Swiss law and noting that "[t]he strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted"). *Cf. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 & n.29, 107 S.Ct. 2542, 2556 & n.29 (1987). This commonly accepted principle applies even in cases, unlike this one, where there is a real tension between United States and foreign law. Thus, foreign defendants can be compelled to make disclosures which they contend would violate the laws of their home countries. *See id.* No such conflict between United States and foreign law arises in this case.

(2) The petitioners expressly submitted themselves—in the instruments by which they raised $250 million—to the jurisdiction of United States courts. Thus, in order to obtain a large infusion of capital, petitioners led respondents to expect that, in any proceeding to enforce petitioners' obligations, respondents would have available to them the same legal remedies that would be available against a domestic borrower. There is no inequity or violation of comity in enforcing that expectation.

(3) Having consented to United States jurisdiction, petitioners committed exactly the sort of act which would lead creditors in respondents' position to insist on invoking United States jurisdiction: Petitioners distributed their assets to Mexican creditors in preference to United States creditors, even though the Mexican and United States claims of unsecured creditors were to have been treated *pari passu*, and even though petitioners had agreed that assets pledged to such other creditors would be ratably pledged to the United States creditors. *See Alliance Bond Fund*, 143 F.3d at 691.

(4) Petitioners affirmatively misled respondents about their dissipation of assets. As the Second Circuit noted, they disclosed for the first time during a hearing before the District Court that they had pledged between $214 and $238 million of the Mexican Government notes to Mexican creditors - not the $117 million they had previously sworn to in an affidavit. *Id.* at 697.

(5) Petitioners made no attempt to invoke bankruptcy or other insolvency laws in Mexico. It may be that, where such laws are invoked, a United States court should ordinarily consider leaving the rights of the parties to adjudication in the foreign forum. Indeed, in at least some instances United States creditors will not want to interfere with foreign bankruptcy proceedings, which may be the best way to assure fair treatment of all creditors. But the District Court's injunction here did not interfere with any foreign proceedings, because there were none. On the contrary, the District Court's order expressly states:

> [N]othing contained herein shall prohibit [GMD] from commencing any insolvency proceedings under applicable law.

J.A. 75, 77

(6) Petitioners acted in bad faith. The District Court was clearly of this view, and the Court of Appeals concurred that petitioners' actions were "less than benign." *Alliance Bond Fund*, 143 F.3d at 697. The Dominican Republic brief simply ignores the factual findings of the courts below, although this Court has stated that such findings should be respected. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489. 498, 116 S.Ct. 1065, 1071 (1996).

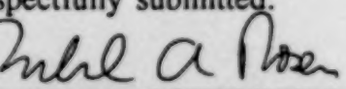
In sum, the District Court and the Court of Appeals for the Second Circuit gave ample deference to the principles of international comity. The injunction issued here was not an abuse of discretion.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: February 16, 1999
New York, New York

Respectfully submitted:



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